Nos. 106, 169 & 170.

PETITION FOR REHEARING

# Supreme Court of the United States

OCTOBER TERM, 1898

TERRITORY OF NEW MEXICO,
APPELLANT,

vs.

UNITED STATES TRUST COMPANY,
OF NEW YORK, ET AL.

NOS. 106, 169
AND 170.

APPEAL FROM NEW MEXICO.

E. W. CLANCY,
Solicitor for Appellant.

NEW MEXICAN PRINTING CO., SANTA FE, N. M.

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| Territory of New Mexico vs. United States Trust Company et al. | Appeal from New Mexico. |

*To the Honorable the Chief Justice, and Associate Justices of the Supreme Court of the United States:*

Your petitioner, the Territory of New Mexico, appellant in the above entitled causes, respectfully prays the court to order a re-hearing of said causes for the following reasons:

First. In determining the character of the estate taken by a railroad company under the name of a "right of way," the court has apparently overlooked its earlier, applicable decisions, with which the holding in this case is in irreconcilable conflict.

Second. The court appears not to have considered the argument that in 1866, when the act of Congress was passed, and for years thereafter, no such meaning had ever been given to the phrase "right of way," as is now claimed for it.

Third. The application to this case of the common law rule that whatever is affixed to the soil becomes a part thereof, is essential to the decision of the court; but this proposition has not been discussed by counsel for appellant on the oral argument or in the briefs, and there is a large number of adjudications bearing on this question adverse to the conclusion of the court, to which the attention of the court has not been called and which the court evidently has

not considered, so that upon a rehearing it is quite possible that the court would find the weight of authority and reasoning so strongly against the application of that rule to such fixtures as are in question herein, as to lead to a different result.

Fourth. The court has failed to notice a material difference between cases Nos. 106 and 170, which relate to taxes in Bernalillo County, and case No. 169, which relates to taxes in Valencia County, the difference being that in Valencia County only a little over one-third of the railroad runs over what was public domain at the time the act of Congress was passed, and only that portion can be considered as exempt under Section 2 of the act, separate assessments having been made of these different portions, as will be seen by reference to pages 80 to 84 of the record.

And your petitioner respectfully submits herewith, as part hereof, the accompanying statement, more in detail, of the foregoing grounds for a rehearing.

TERRITORY OF NEW MEXICO.
By F. W. CLANCY,
Solicitor for Appellant.

I hereby certify that I have examined the record and decision of the court in these cases and am of opinion that this application for a rehearing is well-founded, and should be granted.

F. W. CLANCY,
Counsel.

## STATEMENT OF REASONS FOR A REHEARING.

The rules of the court permit applications for rehearing, but the practice of making such applications is not one in which counsel should often indulge. The invitation extended by the rules is, of course, based upon the possibility of error in the conclusions of the court, and its desire, so far as is possible in any finite institution, to eliminate such error. As a rule counsel should not, however, after once having had an opportunity to present their case, ask for rehearing unless they are quite certain that the decision of the court is wrong, and believe that the court has not had its attention drawn to matters the consideration of which would, or might, lead to a different result; but having such certainty and belief, it is a duty to the court, as well as to clients, to make a presentation of their views. It is proper to say this, in order that the court may understand the spirit in which this application is made in these cases, the success of which will depend only upon the ability of counsel. If the reasons which exist for a rehearing can be fully and clearly set forth, it will be allowed, while failure will indicate merely incapacity so to state the law as to bring it fully before the court. The lack will be in the man, not in the cause.

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It is not intended herein to reargue the case under the guise of a request for a rehearing, but to confine this argument to its legitimate scope. To do this it will be well first to set out what the court has decided.

The opinion of the court may be fairly condensed as follows:

> 1. Congress, in granting a right of way to the Atlantic and Pacific railroad company, in 1866, intended to give, not a mere easement as the phrase would ordi-

narily imply, but either an estate in fee simple or surely more than an ordinary easement, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal property; and this because what was granted is exactly measured as a physical thing and because the possession of the railroad company must be practically exclusive.

2. The interest granted being real estate of corporeal quality, the common law rule that whatever is erected upon realty becomes a part of it, is applicable, and therefore the property sought to be taxed in this case must be considered a part of the "right of way" and consequently exempt from taxation under the letter of the statute.

In addition to this the court is careful to say, however, that it does not intend to depart from the rule of construction heretofore laid down by this court in former cases, and that that rule is not impaired by the present decision which "simply rests on the terms of the statute."

The former decisions of the court in this class of cases establish, as governing rules,

That "exemptions from taxation are to be strictly construed;"

That "when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power" to tax;

That "there must be no doubt or ambiguity in the language used upon which the claim to exemption is founded;"

That "no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power;"

That "the existence of a well founded doubt is equivalent to a denial of the claim."

It being understood that in these rules are to be found our guides as to the construction of statutes containing exemptions from taxation, it is obvious that all which the appellant in the present cases needs to do, is to show that the language of the act of Congress "admits of reasonable con-

tention," or to demonstrate "the existence of a well founded doubt" as to the correctness of either of the positions taken by the court in its opinion. If it shall appear to the court from the present application that there is any chance, upon a rehearing, of appellant's being able to show the existence of a well founded doubt, or that the language of Congress admits of reasonable contention, it is clear that the opportunity should be given for it to do so.

I.

**In determining the meaning of the phrase "right of way" as applied to railroads, the court appears to have overlooked its own earlier, applicable decisions.**

The section of the act of Congress as to which this controversy arises is as follows:

> Sec. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific railroad company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States.

It will be seen that the act of Congress grants a right of way through the public lands, to the extent of 100 feet in width on each side of the road, and this right of way is granted "for the construction of a railroad and telegraph as proposed." There is no reason for applying to the words of conveyance in the act of Congress, for the purpose of sustaining a claim of exemption from taxation,—a purpose contrary to the settled policy of this court,—any different or other rule of construction from that which is applicable to words of conveyance in a deed. There are numerous cases which have been adjudicated in the courts of this country where deeds of the most absolute and complete character, so far as their language is concerned, have been declared to convey to railroad companies mere easements when the land conveyed was for the purpose of building a railroad. One of

the most noteworthy of these cases is one decided by this court and reported in 114 U. S. It is absolutely beyond the power of human ingenuity to reconcile the decision of this court in that case with its opinion in the present case. All of the reasons urged in the present case for holding that Congress in granting the right of way to the railroad company granted an estate in land which was more than a right of way as known to the law in 1866, would apply with equal force to the deeds of conveyance to the Opelika and Oxford railroad company. A railroad company in Alabama was for the purpose of constructing a railroad of the same character and nature as a railroad anywhere else, for the purpose of carrying on the same kind of business, and with similar rights and powers; it would, so far as its right of way is concerned, quite as much as the Atlantic & Pacific railroad company, have a right to exclusive use and possession, and its right would be perpetual, attributes to which this court in the present case gives great importance in determining the meaning of the phrase "right of way." And the right of way conveyed to the Alabama company was "exactly measured as a physical thing, not as an abstract right," just as this court now says of the grant to the Atlantic & Pacific company. The precise point was urged upon the court by counsel in the earlier case and was distinctly and emphatically passed upon. The court used the following clear and unmistakable language:

> "The right granted was merely a right of way for a railroad. It was granted to an existing corporation which had a franchise. The grant to the 'assigns' of the corporation cannot be construed as extending to any assigns except one who should be the assignee of its franchise to establish and run a railroad. Nor did the mention of rights, members and appurtenances belonging and appertaining to the strip of land, or the use of the words "forever in fee simple" enlarge what was otherwise the limited character of the grant. No fee in the land was conveyed, nor any estate which was capable of being sold on execution on a judgment at law or separate from the franchise to make and

> own and run a railroad . The corporation could not have made a voluntary conveyance of the right of way, severed from its franchise. What it acquired is merely an easement on the land, to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor."
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> *East Alabama R. Co. vs. Doe, 114 U. S., 350.*

In the case just cited, reference to the brief of counsel for defendant in error will show that the question was directly raised and necessarily involved as to whether the railroad company took anything more than an easement under the deeds which by their language appeared to convey so much. The attention of the court is invited to a comparison of the language of the deeds, and of the act of Congress. In the Alabama case the court says all that the company acquired was "merely an easement on the land;" while in the present cases, it says that surely more than an easement, if not the fee itself, was granted.

Both decisions cannot be right, and it is respectfully submitted that the court should adhere to what has been the unchallenged ruling of the court for nearly fourteen years.

There is another and still earlier case decided by this court, to which no reference is made in the opinion, which is quite as difficult of reconcilement with the present decision as is the case of the *Railway Company vs.Doe.* In that case the court had under consideration "the proper construction of the act of June 8, 1872, 17 Stat. at L. 339." That act granted to the railroad company,

> "The right of way over the public domain, one hundred feet in width, on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops and other buildings for railroad purposes, and for yard room and side tracks not exceeding 20 acres at any one station, and not more than one station in every ten miles, and the right to take, from the public lands adjacent thereto, stone, timber, earth, water and other material required for

the construction and repair of its railway and telegraph line."

It will be seen that this right of way was granted in substantially the same terms as the grant to the Atlantic & Pacific railroad company. Now as to the proper construction of this act this court, speaking through Mr. Justice Harlan, said:

> "That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches. In this view, and having due regard to all the circumstances and condition of the company, when the act was passed, we do not doubt that the intention of Congress was to grant to the company a present beneficial easement in the particular way over which the designated routes lay, capable, however, of enjoyment only when the way granted was actually located, and, in good faith, appropriated for the purposes contemplated by the charter of the company, and the act of Congress."
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> *R. R. Co. vs. Alling, 99 U. S. 475.*

It is certainly difficult to understand how Congress could have two such entirely different intentions, in 1872 and 1866, as this court ascribes to it by its opinion in the above cited case of *Railroad Company vs. Alling* and in the present case, when the language is substantially the same in the two different acts. If Congress, as this court decided, by the act of 1872 intended "to grant to the company a present *beneficial easement*," by what mode of reasoning ought we to impute to Congress an entirely different intention in the earlier act of 1866?

In this connection attention is called to the views of Mr. Justice Brewer, expressed before he became a member of this court, when he declared, with regard to condemnation proceedings, that,

> "Unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use. The record of these proceedings is not entirely clear, but I think the

fair construction to put upon it is that the railroad was seeking to take no more than was needed, and that was the easement—the use."

*Keener vs. U. P. R. R., 31 Fed., 128.*

Certainly these views are not in harmony with the reasoning of the court in the present case as to the nature and character of railroad business forcing the conclusion that more than an easement is needed for a railroad. They are the views which a lawyer would naturally entertain, while the opinion of the court here is an innovation upon long-established ideas, and with the result of sustaining a claim of exemption from taxation, a result which this court has heretofore sought in every possible way to avoid.

May there not be here some "well-founded doubt" which this court says "is equivalent to a denial of the claim?" Is it not true that "the language used admits of reasonable contention?" Is there not in the decision of the court something like the indulgence of a mere "implication" which leads to "construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power?" For if Congress had intended to exempt the railroad and telegraph line from taxation, could it not, and would it not, in terms have clearly expressed that intention, without leaving it to be evolved by implication and by attributing a new meaning to an old and well-understood term of the common law?

Undoubtedly a conveyance of the railroad of the Atlantic & Pacific railroad company, would carry with it the roadbed, ties, rails, bridges, culverts and everything of that sort, and also the "right of way;" but it cannot be said logically that the "right of way" must include the railroad and all the other things. The right of way is a part of the railroad, but the railroad is not a part of the right of way. This statement seems sufficiently self-evident; but the court has held in substance that a railroad and telegraph

line are mere additions to, and therefore a part of, the "right of way" of the company.

Now, if this ruling is to stand, we will be introduced to this sort of controversy: The right of way includes the railroad; exemption of the right of wayfrom taxation exempts the railroad from taxation; exemption of the railroad from taxation includes everything necessary to the operation of the railroad, and numerous authorities can be found to support this view and to extend the exemption of a railroad from taxation to everything necessarily used in connection therewith, and in many cases even to those things which are merely convenient to the use of the railroad.

## II.

**In determining the meaning of the phrase "right of way" as applied to railroads, the court is at variance with the great mass of authority in the United States.**

A few of the decisions on this point were cited in the brief for appellant heretofore filed in this case, and attention is now again called to them, and, somewhat in detail, to a few others out of the great number which can be found in the reports of the various states.

In Michigan the court had under consideration a deed of which the granting clause was as follows:

> "All that certain piece or parcel of land situate, * * * and described as follows, to-wit: The right of way for a railroad running from the marl bed of said cement company to their works, on the west side of Kalamazoo River, and described as follows: 'A strip of land forty feet wide; * * * and being nine hundred fifty-two feet in length."

It is further stated in the opinion that the deed was "in the usual form of a full covenant warranty;" and the court speaks as follows:

> "We think the court below was correct in holding that the deed conveyed an easement only, and not a fee. It does not purport to convey a strip of land forty feet wide, etc., but the right of way over a strip forty feet wide. Cases undoubtedly can be found in which the operative words of the grant relate to the land itself, but such construction cannot be given to this deed. Where the land is first conveyed and then a provision afterwards inserted showing what the land is to be used for it is held in many cases that the fee is conveyed and the clause providing for what the land is to be used is a condition subsequent; but this deed is not open to that construction. It is clear that an easement only was here intended."

*Jones vs. Van Bochove, 61 N. W., 343.*

No distinction favorable to the decision of this court in the present case, can be made between the words of conveyance in the Michigan deed and the words of conveyance

contained in the act of Congress. If there is any substantial difference the language used in the deed is more strongly indicative of a conveyance of land than is the language in the act of Congress.

That deed conveys, in terms, a right of way "described as" a strip of land 40 feet wide and 952 feet long; while the act of Congress conveys a right of way "to the extent of one hundred feet in width on each side of said railroad."

In Nebraska a deed conveyed to a railroad company, its successors and assigns, for right of way and for operating its railroad only, a strip of land 100 feet wide across certain lands described by government subdivisions, and it was held to convey no title to the land which would enable a successor or assignee of the original grantee to sell and convey a portion of the 100 foot strip to another railroad company for its use, but, on the contrary, that the original deed conveyed only an easement.

*Blakely vs. R. R. Co., 64 N. W., 972-3.*

There is no substantial difference between this Nebraska deed and the act of Congress under consideration, except that the deed conveys land for certain purposes, while the act conveys a right of way; but it cannot be contended by any one that the right of way granted by Congress was for any other purpose than for the "construction of a railroad and telegraph as proposed."

In Vermont a deed was made conveying "a strip of land four rods in width across my land," and having, at the end of the description, the words "for the use of a plank road," that being apparently the only difference from an ordinary deed of conveyance; and the supreme court of the state held that only an easement was granted and nothing more.

*Robinson vs. R. R. Co., 59 Vt. 426.*

In Missouri, an act of incorporation of a railroad company authorized the company to "take, hold, use and enjoy the fee simple or other title in and to any real estate." The

company acquired land by condemnation proceedings, over which it built and used a railroad. The owner from whom the land was so acquired, sold and conveyed his land to another, who sued him upon his covenant of seizin, alleging that the company owned the land in fee simple which it had condemned, and which was a part of the land conveyed. The opinion sets out that the statute authorized condemnation proceedings which would result in a judgment in favor of the owner against the company, for the damages assessed, and "an order vesting in the company the fee simple title to the land;" and it appears that such a title had been acquired by such proceedings. The court held, however, that only an easement had been acquired, that the use only had been taken, and that there had been no breach of the covenant of seizin.

Kellogg v. Malin, 50 Mo. 499.

"By the statutes of this state, railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such lands is vested in the company, its successors and assigns. The difference between the perpetual use of land, and the fee to it is only nominal. The interest a railroad company acquires in land in this state for a right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee, burdened by such an easement of perpetual use, is only nominal. (*22 Minn. 286*; *68 N. Y. 591*; *122 Mass. 110.*) The statute seems to recognize this because it requires the commissioners to assess the value of the land taken."

*Pilcher vs R. R. Co., 38 Kan. 522.*

"The line of railway operated by appellant was constructed more than thirty years since over the lands of G. W. Telford, and has been continually operated. Very recently the railway company has put in a side track over the same land, and within thirty feet of the main track. The executors of Telford, in whom is vested the legal title, bring this action as for an additional appropriation. The company defends upon the ground that this additional track has been put upon their own right of way. No conveyance was ever made by Telford of any right of way, and no condemnation had. The railway company claims a right of way of one hundred feet on each side of the center of the track under the provisions of section 23 of their charter, which is in these words: 'In the absence of any contract with the said company in relation to land through which the said road may pass, signed by the owner thereof, or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with a space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same be used only for the purposes of said road, and no longer, unless the person owning said land at the time that part of the road which may be on said land was finished, or those claiming under him, her or them, shall apply for an assessment for the value of said land, as hereinbefore directed, within five years next after that part of said road was finished; and in case the said owners, or those claiming under them, shall not apply for such assessment within five years next after the said part was finished, they shall be forever barred from recovering the said land or having any assessment or compensation therefor, etc.

* * * * *

"We are of opinion that the grant presumed to have been made by Telford was a grant not of the fee, but of an easement. The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public. Statutes authorizing a taking of private lands for railway purposes generally limit the taking to an easement, leav-

ing the fee in the owner. When the statute does not clearly authorize the condemnation of the fee the easement alone should be condemned. This charter method of condemnation does not expressly condemn the fee and we think the 'grant' presumed and the 'title' acquired is a grant of an easement and the title to the easement and nothing more. *Cooley Con. Lim (5th Ed.). 691; Washington Cemetery Co. vs. Railway Co., 68 N. Y., 594; Lewis Em. Domain. Section 278.*"

*Railway Co. vs. Telford, 89 Tenn., 295, 297, 298.*

"The interest, or estate, which a railroad corporation acquires in land taken by it for railroad purposes by condemnation is, and from the nature of the uses must be, a right to the occupation of it, exclusive in point of user, and practically unlimited in point of duration. This right, while for many purposes it is substantially equivalent to the fee, is not the fee."

*Fitch vs R. R. Co., 59 Conn., 419-20.*

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One of the reasons given by the court for holding that the "right of way" granted is not an easement, is the applicability of ejectment to the recovery of possession of the "right of way;" but such applicability may be admitted without affecting appellant's position.

The true reason for holding that the interest of a railway company in its right of way is such as to support an action of ejectment, is not to be found in the idea that its estate partakes of the nature of an estate in fee simple, but because, while only an easement in the strict sense of the

word, yet it is such an easement as entitles the company to practically exclusive possession of the land over which it has the right of way, and ejectment is only a possessory action. This is abundantly established by authority, in cases where the courts have been careful to adhere to the proper meaning of the term "right of way," while showing the difference between this kind of easement and others as to the right of possession. A few quotations from authorities will show this beyond question.

"It is objected in the next place, that plaintiff has not sufficient property in the real estate to maintain ejectment; that plaintiff has only an easement, and no title to the soil; and that ejectment will not lie for the recovery of an easement.

"It is true that ejectment will not lie, as a general rule, for an easement, or to be let into the use and occupation of a servitude. The reason is that the party complaining has only a right in common with the public, or with some other person or persons, to the use or occupation claimed. The right is a qualified, limited one, and, in ordinary cases, is not disturbed by another's simple occupation. It is but a privilege to go on the lands of another for a specified, limited purpose and has no element of exclusiveness in it. A right of way, or common, may be given as illustrations of this principle. *Washb. on Easements (3d Ed.), 3, 260-270; Child vs. Chappell, 9 N. Y., 246; Morgan vs. Royle, 65 Maine, 124; Rees vs. Lawless, 12 Amer. Dec. 295.* There are cases which go beyond this doctrine. *Wood vs. Truckee Turnpike Co., 24 Cal., 474; Union Canal Co. vs. Young, 30 Amer. Dec. 212; 2 Wait's Ac. & Def., 247; 2 Redf., R'w'y, 553.*

"Lands claimed and condemned as road bed and right of way of a railroad stand in a different category from that of ordinary easements. Over them is acquired, not the right of use to be enjoyed in common with the public, or with other persons. The right and

use are exclusive, and no one else has any right of way thereon. *M. & O. R. Co. vs. Williams, 53 Ala., 595; M. & M. R'w'y Co. vs. Blakely, 59 Ala., 471; Tanner vs. L. & N. R. R. Co., 60Ala., 621; S. & N. R. R. Co. vs. Pilgreen, 62 Ala., 305; Cook vs. Cen. R. R. & Banking Co., 67 Ala., 533; R. & G. R. R. Co. vs. Davis, 2 Dev. & Bat. (Law), 451; Jackson vs. R. & B. R. R. Co., 25 Vt., 150; T. & B. R. R. Co. vs. Potter, 42 Vt., 265.*

"Ejectment was originally classed as a possessory action. Hence it was that at common law any number of causes could be maintained, by laying the demands at a later date. One recovery was only conclusive as to one and the same demise. A right to the immediate possession, in fact legal as distinct from equitable, would always maintain the action, and it will yet. Prior possession is sufficient against any one afterwards found in possession unless the latter can show a paramount title, or a possession continuous, peaceable and adverse, of sufficient duration to toll the entry. *Tyler on Ejectment, 70; Ib. 165; Anderson vs. Mealer, 56 Ala., 621.* The lessee or termor, during the continuance of a valid lease, may maintain the action against the lessor, although the owner of the entire fee less the term. So, the title of a railroad corporation to the possession of the soil covered by the road bed and right of way will, after condemnation, dominate all adverse claim of possession, even by the owner of the fee. "Although the right which a railroad company acquires to land taken under their charter, is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety require that the possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used." *Conn. & Pass. River R. R. Co. vs. Holton, 32 Vt., 43."*

*T. & C. R. R. Co. vs. E. A. R. W. Co., 75 Ala., 523-4.*

The same case having again come before the supreme court of Alabama, the court took occasion to say:

"Right of way for a railroad is an easement—an interest in the freehold—which can only exist in grant or by prescription."

*E. A. R. W. Co. vs. T. & C. R. R. Co., 78 Ala., 281-2.*

"We think it clear that the plaintiff, under his grant, has a right of entry upon and possession of the land in question, and that this right of possession is necessarily an exclusive right, as against all certainly besides the United States, and gives the plaintiff such a legal interest in the land as enables it to maintain an action like the present, to recover the possession from one who has wrongfully entered thereon. The obstacles to this suit, such as they are, are entirely technical. If the plaintiff is entitled to actual possession of the land, for the purpose of effecting the object in view when the right of way was granted, it can recover such possession in some judicial proceedings. The mere form of the action has ceased to be of any importance in this court.

"There is now but one form for all the common law actions. In every action the complaint contains a statement of the facts of the case, and is held sufficient, if the facts stated entitle the plaintiff to the relief demanded. We think this complaint does state a good case. It may be admitted that for the obstruction of a mere easement the recovery of the possession of the land itself would not be the proper remedy. But in order that the plaintiff in the case at bar may make such use of the land as the grantor intended it should under the grant of a right of way, it becomes necessary to take and keep an actual possession of the land. It must also be a possession exclusive of all other persons. This is obvious enough as to all the land upon which a track, a depot or other superstructure is placed, and we think the same is true of the whole two hundred feet on each side of the track. The grant is a right of way to the extent of two hundred feet on each side of the track, and the plaintiff is entitled to possess and use the whole quantity."

*Central Pac. R. R. Co. vs. Benity, 5 Fed. Cas., 363.*

In Vermont it was settled at an early day that railroad

companies took no fee to the land occupied for their purposes, but only an easement—a right of way—although they were, by the statute, to be "seized and possessed of the land."

*Quimby vs. R. R. Co., 23 Vt., 393.*

And yet it was held that they could maintain trespass, *quare clausum fregit*, against the owner of the fee of the land over which the right of way existed, objection being distinctly made that such action of trespass would not lie for interference with enjoyment of an easement. The court did not attempt to combat the settled doctrine that the railroad had only an easement, but put its decision substantially on the same ground as that now suggested herein —the necessarily practically exclusive possession of the company, which would make applicable to this easement remedies which in earlier times were applicable only to absolute ownership of the land.

The court said:

> "Although the right which a railroad company acquires to land taken under their charter is said to be merely an easement, yet the nature of their business, their obligations to the community and the public safety, require that their possession of the land so taken should be absolute and exclusive against the adjacent land owner, so far as to secure fully every purpose for which the railroad is made and used."

*R. R. Co. vs. Holton, 32 Vt., 47.*

> "We return, then, to the question: Was this easement capable of transfer? The question seems to be one of first impression. At all events, no case is cited, and we can find none, in which the point has been adjudicated. The subject matter of the question—the right of way for a railroad—is itself new; and the

principles, long ago established in regard to rights of way personal or in gross, and right of way appurtenant to real estate, have no direct application to this new class of rights of way. It, we apprehend, is *sui generis*, and must be governed by reasons peculiar to itself, and the rights which may be derived from the analogies it may bear to the old classes of easements of this kind, whose incidents have been already fixed and determined. It seems to be settled that "if a right of way be in gross, or a mere personal right, it cannot be assigned to any other person, nor transmitted by descent. It dies with the person, and is so exclusively personal that the owner of the right cannot take another person in company with him. But when a right of way is appended or annexed to an estate, it may pass by assignment when the land is sold to which it was appurtenant."

*R. R. Co. vs. Ruggles, 7 Ohio St., 7-8.*

"By the statutes of this state railroad companies are allowed to appropriate land for public purposes, and the perpetual use of such land is vested in the company, its successors and assigns. The difference between the perpetual use of land and the fee to it is only nominal. The interest the railroad company acquires in land in this state for right of way, while only an easement, may be permanent in its nature, and may be practically exclusive. The value of the remaining fee burdened by such an easement of perpetual use is only nominal."

*Pilcher vs. R. R. Co., 16 Pac., 948.*

Attention is called also to

*Williams vs. R. W. Co., 50 Wis., 76.*
*R. R. Co. vs. McWilliams, 71 Iowa, 164.*
*Lyon vs. McDonald, 78 Tex., 71.*
*Lumly vs. R. R. Co., 23 Vt., 387.*
*R. R. Co. vs. Swivney, 38 Iowa, 182.*
*Trust Co. vs. R. R. Co., 63 Fed., 613.*
*Quick vs. Taylor, 113 Ind., 540.*
*R. W. Co. vs. Geisel, 119 Ind., 77.*
*Ingalls vs. Byers, 94 Ind., 135-6.*

It appears to be quite clear from these authorities that wherever a conveyance of land is limited to any public use such as a railroad, a highway, a toll road, or a public park, the courts will hold that no fee is conveyed but only an easement for the use and benefit of the public. There is nothing to be found in the act of congress which calls for a more expanded meaning for the benefit of a recipient of public bounty which is now seeking to evade its due share of the burdens of taxation.

It is certainly difficult to understand how, in the light of these various decisions it can be asserted that the language of the act of congress does not admit of "reasonable contention" or that there is no "well-founded doubt," which this court has declared will be fatal to any claim of exemption from taxation.

## III.

### Up to 1866, and for many years thereafter, right of way was never used to mean anything more than an easement.

This is a negative proposition, and the burden of proof is naturally on those who combat it. No such proof has been adduced, and it is here confidently asserted that none can be found. What we are seeking is the intent and meaning of congress, and we must not impute to congress any meaning of its language different from that which prevailed at the time of the enactment under consideration.

*Endlich on Statutes, sections 85, 357.*

As tending to throw some light on this subject, an examination has been made of early debates in congress in which that section of the Northern Pacific charter which is in the same language as section 2 of the Atlantic & Pacific act—hereinbefore quoted—was under discussion, and some notes of the results are herewith presented.

It is not intended to claim, or supposed, that such things can be allowed to control the meaning of a statute, nor is it forgotten that courts will not ordinarily resort to evidence *aliunde* as to the legislative intent; but it is desired to call the attention of the court to the fact that many times a statute containing this same exemption from taxation was under consideration in both houses of congress, and was the subject of extended debate and careful scrutiny by some of the most eminent lawyers of their day; but none of them discovered any such meaning to this exemption from taxation as is now suggested, although an examination of the debates will make it clear that attention would have been called to it if any such meaning had been dreamed of in

those times. This is but a negative proof, but coupled with the reputation and ability of the men who were critically examining this statute, it may go far toward inducing the court to believe that there may be a "well-founded doubt," and that the language used admits at least of "reasonable contention." What was said by such men—men of eminence, skill, experience and great reputation both as lawyers and as statesmen—may properly be submitted to the court just as opinions of courts or of authors of repute are cited. Attention is particularly called to the remarks of Senator Thurman.

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On February 28th, 1870, as will appear by reference to the Congressional Globe, part 2, second session, 41st Congress, at pages 1584-5-6, the senate had under discussion Joint Resolution No. 121, authorizing the Northern Pacific railroad company to mortgage its lands, and providing for indemnity lands in lieu of land which had been located within the limits of its grant, and Senator Pomeroy, after having stated that he was on the committee on public lands in 1864, when the charter was granted and the whole subject canvassed in committee, said:

> "In 1864 it was claimed that congress having passed a Pacific railroad bill in which it granted both lands and bonds, here was an enterprise, the Northern Pacific railway, that could be built upon lands alone. * * * It was distinctly understood and agreed that this road should be constructed, as perhaps no other ever was, and I do not know that one ever can be, upon the stock of the company with a land grant large and certain."

Not a word was said about the valuable exemption from taxation.

At a later day in the same session, March 2, 1870, at pages 1624 to 1627 of the same book, the discussion was resumed. The resolution was strongly opposed as to the clause giving indemnity lands, especially by Senator Casserly, who, at great length, expatiated upon the enormous land grant which had been given, but never hinted at the conferring of an exemption of the railroad and telegraph line from all taxation in the territories. Examination of this debate will convince any reader that if any such valuable immunity as is now claimed for the Atlantic & Pacific company had ever been intended, it would not have escaped the attention of the senators interested who were engaged in making the strongest possible showing of what had been given the company as a reason for giving it no more, and it is to be borne in mind that at that time there were still in the senate many senators who had been there when the Northern Pacific act of 1864 and the Atlantic & Pacific act of 1866, were passed.

This debate was renewed April 7, 1870, and continued at great length as will appear by reference to pages 2480 to 2486 and 2491 to 2495 of the same book, but in the whole discussion no statement is made by any one to indicate that the railroad and telegraph lines were to be free from taxation in the territories of the United States. On the contrary it was in substance declared more than once, that the railroad company received "from the government aid only in the form of lands lying in alternate sections." (P. 2492.)

On the 9th of April, 1870, p. 2539 of the same book, this resolution was again taken up and the discussion continued to page 2547. On page 2539 appear remarks by Senator Harlan, who said, referring to certain railroads in Minnesota:

> "The grant of those roads is but five sections to the mile on each side of the road, being ten to the mile only. Now, if those companies having in hand the construction of their lines of road across the state of Minnesota are able to build them with a subsidy in

> lands of ten sections to the mile, can it be pretended that this company cannot construct that part of their road which lies in the state of Minnesota with just double that amount, which they now have under the existing law?"

If the honorable senator who was making this argument had imagined that the company had any such valuable exemption from taxation as is now contended for, he would certainly have urged the existence of such a grant as additional evidence of the ability of the company to build the road without further concessions.

At page 2546 Senator Howard said:

> "As I said before, this company have never received a dollar in the form of subsidy from the United States. They are to rely upon their own private means and upon the public lands which we gave them to raise the money to carry on this vast enterprise."

At page 2540 Senator Harlan said:

> "But, sir, the applicants for this increased subsidy do not understand these lands to be worthless. They are doubtless men of intelligence. They have read what has been written and published with reference to the topography of this part of our country. They know that on account of the reasons to which I have referred, as well as on account of the great depression in the mountain ranges west of the lakes, giving free access to the humid atmosphere from the Pacific ocean, this whole line of country is a fruitful country; that it produces grass and timber up to the very foot of the Rocky mountains, and through all of the valleys of the various mountain ranges, until you approach within a few hundred miles of the Pacific coast where the whole country is densely covered with immense forests. It is not a desert, therefore. If any one will take the trouble to read the report of Governor Stevens of his exploration of this proposed line of road, he will ascertain that from actual observation and personal inspection it is found to be a fertile country. This being so, it becomes manifest, as it seems to me, that the quantity of land already granted is sufficient inducement to enable the company, if they can be induced by a grant of land, to build this road."

On the 11th of April, 1870, the debate on this resolution was again renewed, beginning at page 2569 of the same book and running to page 2584. In this day's debate Senator Thurman, violently opposed to the resolution, made an extended argument against it and attempted at the beginning of his remarks to enumerate the benefits given to the company by the original act, as to which he spoke as follows:

"Now, Mr. President, let us look at what this company is, and what has already been done for it. It was chartered on the second of July, 1864, nearly six years ago. By its charter there was granted to it throughout the greater part of its route, throughout the territories of the United States, every alternate section in a breadth of eighty miles, being forty alternate sections to the mile. These forty alternate sections to the mile make twenty-five thousand, six hundred acres, to the mile; and these twenty-five thousand, six hundred acres, at the government price of $1.25 an acre, will come to a subsidy of $32,000 per mile.

"But this is not all. In addition to this subsidy, equal to to $32,000 per mile at the government price of land, there is given to this road the right of way, and no ordinary right of way of fifty or seventy-five feet in width, but a right of way four hundred feet in width, throughout the entire length of the line and the length of its branches. In addition to this right of way there is given to it absolutely all the land it may need for work shops, depots, water stations, or any of the other structures necessary to the road, although they may be outside of the right of way of four hundred feet.

"Again, sir, the right is given to this company to take from the lands of the United States, wherever situate, all the materials it may need for the construction of the road, whether they be wood or stone, or iron, or gravel, or what not. The right to take all material it may need or can find anywhere upon the public lands is given to this company absolutely as a free gift.

"That is not all. Of the alternate sections that are given to it there are no exceptions on account of either coal or iron. While mineral sections are excluded from the grant in terms, it is also provided that the term

> "mineral section" shall not apply to sections containing iron ore or coal; so that the most valuable iron ores near Lake Superior, the most valuable iron ores that may be found on the route in the western part of the line, may all belong to this company, as well as the most valuable coal mines."

By comparing his language with the section containing the exemption from taxation, it is evident that the senator had that section under his eye while speaking, and yet, in the enumeration of the benefits conferred, he considered the exemption so insignificant as not to be worthy of mention. It cannot be believed for a moment that, if the construction now given to this exemption had ever been dreamed of in 1870—if such a meaning as is now imputed to the language of Congress had ever been heard of by any one in or out of the legal profession—the trained eye of such a lawyer as Mr. Thurman would have overlooked it at a time when he was exerting all of his great powers in an exhaustive argument where he sought to show to the fullest extent the enormous donations and benefits which Congress had conferred upon the company. In scanning the language of this section, he did not consider this exemption of any consequence whatever; and yet for the purposes of his argument on that occasion, an exemption from taxation of the whole of the railroad and telegraph line through the territories of the United States—and at that time almost all of the Northern Pacific railroad was projected to run through the territories, nearly two thousand miles—would have been of immense importance and would have greatly strengthened his statement of the grants made to the company. Moreover, he recurs to this subject of the right of way two or three times in his speech, but fails to discover this wonderful exemption. The conclusion is irresistible that up to 1870 no one had ever heard of the greatly expanded meaning of the term "right of way" which makes it synonymous with the land itself over which the right is to be exercised. If such a meaning was at that time un-

known, it certainly does violence to every applicable rule of statutory construction, now to say that Congress intended something which no one had ever heard of at the time the act was passed.

The discussion of this resolution was resumed in the senate on April 20, 1870, as appears in part 4 of the Congressional Globe at pages 2833 to 2844 and pages 2867 to 2869, when the resolution was finally passed. Then the resolution went to the house, where it was up for discussion on four different days as will appear by reference to pages 3263 to 3271, 3343 to 3348, 3365 to 3368 and 3786 to 3798. It is true that on two of these days the proceedings were almost entirely of a filibustering character for the purpose of compelling opportunity for debate and the offering of amendments, and in this the minority was successful; but no one in the house any more than in the senate, discovered anything remarkable in the exemption from taxation.

The speech of Mr. Casserly on this resolution, made in the senate on the 20th of April, 1870, is printed in the Appendix to the Congressional Globe for the second session of the 41st Congress, beginning at page 303, and near the beginning he says:

> "Senators are now well informed as to the nature of the work to be undertaken by the Northern Pacific railroad company. Senators know—they cannot pretend any ignorance—that for the length of it, it is the easiest road to build in the whole world of railroads. Compared with any other great railway, there is upon its line less heavy work, there are fewer broad rivers to be bridged, fewer high summits to be overcome, fewer wide valleys or deep chasms to be spanned or filled. Beyond this, and much more than this, its route lies through a finer and more fertile country, taken altogether, than is traversed by any other railroad line of anything like the same length in the United States or on the globe. All this is well understood. No one pretends to doubt it. In all this debate no question has been made of it by any friend of this measure."

In his elaborate speech, covering almost seven and a half pages of the Globe, the learned senator fails to discover, in

his attack upon the system of great gratuities conferred upon railroad companies, this vicious exemption from taxation, an exemption so broad, so evil, so far-reaching, that had it really existed in the statute, such a man as this senator would certainly have discovered it.

In a speech of Mr. Stiles, of Pennsylvania, made on the 25th of May, 1870, which is printed at page 609 of the appendix, the speaker, much like Senator Thurman, carefully enumerates the grants made to the Northern Pacific railroad company, dwelling especially upon the things set out in the second section of the act, and particularly emphasizing the great value of the gift of free right of way, but he fails to discover in that section this remarkable exemption from taxation, although he was evidently looking for everything which had been given to the company.

At page 391 of the same appendix will be found an extract from the report of the directors of the Northern Pacific company setting forth the valuable possessions of the company which would easily enable it to build the railroad, but they fail to mention this important item of exemption from taxation, because at that time no one had ever thought of such a thing.

In the 39th Congress an effort was made to get the government to guaranty the interest at six per cent upon the stock of the Northern Pacific railroad company and the measure was discussed in the house of representatives on the 24th, 25th, 26th and 27th of April, 1866, as will be seen by reference to the Congressional Globe at pages 2159 to 2161, 2182 to 2191, 2203 to 2215 and 2235 to 2246, when the bill was finally defeated by a vote of 76 to 56.

In the course of this debate, page 2208, Mr. Donnelly, of Minnesota, said:

> "Now we have had presented here by the opponents of this bill, quotation after quotation from pamphlets and from speeches to show that the land grant already made to the company is of such enormous value that it alone ought to enable the company to build the road; that in any event it is of such great value that when the road shall have been constructed the land adjacent to it and already granted to the company will be equal in value to the total cost of the road itself."

And, a little later, he quotes from a letter of the Honorable John Wilson, third auditor of the treasury department, as follows:

> "I have not the figures nor would I now be able to work them up if I had, but comparing this with the Illinois Central railroad grant, I think it a small estimate to say that if this grant is properly managed, it will build the entire road, connecting with the present terminus of the Grand Trunk, through to Puget Sound and head of navigation on the Columbia; fit out an entire fleet for the China, East India and coasting trade, of sailing vessels and steamers, and leave a surplus that will roll up to millions."

This had already been quoted by other gentlemen. Everybody agreed as to the enormous value of the land grant.

At page 2213, Mr. Washburne, of Illinois, inveighs with great earnestness against the third section of the proposed bill which would have exempted the lands granted to the railroad company from all taxation until after two years from the date of their conveyance by the company, and pointed out the monstrous injustice to the people of the territories, who, as he declared, "should have the right to tax all the lands to support their government, maintain their schools, build their public buildings, roads, etc." Manifestly, with all his opposition to this company and to the great grants which had been made to it, he had never discovered the exemption from taxation now contended for,

had never dreamed of such a construction, or he would have proclaimed it with all the great vigor which he possessed.

At the same session of Congress, in the senate, a bill was introduced which appears to have been the same, or substantially the same, as the one which had been defeated in the house. Debate on this bill began July 14, 1866, page 3807 of Congressional Globe. The committee reported various amendments, one of which was an exemption from taxation of the lands of the company for five years after the issuing of patents for the same, the bill having previously provided for exemption from taxation until the lands should be sold and conveyed by the company. Mr. Sherman violently opposed this bill. The discussion was resumed July 16, 1866, pages 3830 to 3838. On pages 3831-2, Mr. Sherman clearly sets out the two railroad propositions of the Union and Northern Pacific, sharply defined, as they were before Congress in 1864, and plainly shows that no such considerations existed at that time as have been urged on behalf of appellants in the present case. While expressing his strong conviction that the road could be built upon the land grant alone, he never refers to the exemption from taxation of the right of way as one of the inducements to investors. This bill was also opposed by Senator Fessenden at great length. Its discussion was resumed July 17, 1866, at page 3866 of part 5, Congressional Globe, First Session, 39th Congress, and on motion of Mr. Sherman, page 3867, referred to the committee on the Pacific railroads, which had the effect of carrying it over the session. The bill was reported by the committee, July 24, 1866, page 4064, with amendments materially reducing the aid proposed to be given to the company, and was then post-

poned until the next session of Congress. It does not appear, however, to have been revived or called up at the next session.

Upon the discussion of a joint resolution extending the time for the building of the Northern Pacific railroad, in the senate, May 30, 1868, at page 2689 of part three of the Congressional Globe, Second Session, Fortieth Congress, it is stated several times in substance that the only aid the railroad company had been granted was the land grant.

In a memorial of the Northern Pacific railroad company, printed as H. R. Misc. Doc. No. 272, Forty-third Cong. First Session, at page 2, it is declared that "The only aid given to the road by the government was land."

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The most cursory examination of these lengthy debates in Congress cannot fail to convince the reader that such meaning of "right of way" as would make that phrase synonymous with the land itself, or such a construction of the statute as would extend the exemption of the "right of way" from taxation, to an exemption of the whole railroad and telegraph line, had never been contemplated by any

one. No one discovered it; no one mentioned it; no one ever hinted at it; although the close, eager, zealous, critical attention of many of the keenest minds and best trained intellects our country has ever produced, was, for long periods of time, fixed, not only upon a statute containing this provision, but even on the very section which declares the exemption.

## IV.

### The common law rule that whatever is affixed to the soil becomes a part thereof, cannot properly be applied to the present case.

If it be admitted, *arguendo*, that the court is correct in its first position, that Congress granted either an estate in fee simple in the two hundred foot strip, the use of which for a right of way it gave through the public domain, or at least more than an ordinary easement and something of a corporeal nature, appellant still insists that the common law rule, that things affixed to the soil become a part thereof, can have no proper application to this case. This proposition was not discussed by counsel for appellant either on the oral argument or in his printed briefs, and it is now clear that this was a mistake on his part. It can only be said in excuse that he was so misled in his views of the case as to attach but little importance to this question which the opinion of the court has shown to be really decisive of the case. A rehearing might well be granted upon the ground alone that such a vital question had not heretofore been argued.

#### A.

#### As to this point this is a case of the first impression in this Court.

It should be understood at the outset that so far as the application of this rule of the common law is concerned, the present case is the first of its kind in this court, that it is entirely new in this ~~form~~ *forum*, that there is nothing in the earlier decisions of this court on this point which will serve as a guide in the peculiar circumstances of this case. Therefore, if there is any doubt, certainly the benefit thereof must be given to the taxing power. The question has arisen in but two jurisdictions heretofore, once in Montana and twice in Arizona, with directly opposite results.

*N. P. Co., vs. Carland, 5 Mont., 146.*

*A. & P. Co., vs. Lesueur, 19 Pac., 157.*
*A. & P. Co., vs. Yavapai, 21 Pac., 768.*

It is not meant that this court has never been called upon to consider whether rails, ties and bridges do not become a part of a railroad to which they are affixed, or would not pass under a mortgage or conveyance of the railroad; but that it has never been called upon to consider whether such things become a part of the soil to which they are affixed in a controversy between a sovereign power attempting to exercise its authority to tax, and a railroad company seeking to evade taxation.

The full extent to which this court has gone in the application of the common law rule is clearly set forth as follows:

> "Whatever is the Rule applicable to locomotives and cars and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled, in the decisions of this court, that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."
>
> *Porter vs. Steel Company, 122 U. S., 283.*

It is obvious that such a decision is based principally upon a consideration of the relations between the parties,

upon their relative positions toward each other, and is not intended to lay down a hard and fast rule applicable to all cases in which the question of rails and other articles affixed to the soil may arise. The most frequent occasion for making exceptions, arises from the differing relations between the parties. To this we will hereinafter recur.

**B.**

**The general condition of the law of fixtures is such that the court should not apply the common law rule to this case.**

In the present case the court applies the common law rule that whatever is affixed to the soil belongs to the soil, with all its ancient rigor and strictness. Now before proceeding to the consideration of how far that rule has been relaxed in modern times, attention should be called to the fact which might well be controlling, that when that rule came into existence, and during the greater portion of the time that it has continued, no such things as railroads were known. Nothing even analogous to these public instrumentalities for trade, commerce and transportation, devoted to the use of the public, had been dreamed of. If the application to new conditions of such an artificial rule leads to manifest injustice or absurdity, then the courts will hold it inapplicable. If this is not so, then the claim that the law is a progressive science, adapting itself to new conditions and to the numerous complications ofmodern life, must be abandoned.

Of course it is the intention of Congress which is to govern, and that intention is to be deduced primarily from the language of the statute. The court has taken the view that, from that language alone, we must draw the conclusion that Congress intended, *first*, to grant a corporeal estate in land by the grant of a right of way, *eo nomine; second*, by the grant of an exemption of the right of way from taxation, to extend such exemption to every thing which might be affixed to the land through and over which the right of way is granted, having in mind the rule of the

common law above referred to. Let us first briefly consider the general condition of the law on this subject.

The most fruitful source of the numerous modifications and exceptions to the common law rule as to fixtures, is to be found in the different relations which parties bear to each other. That which is a fixture and a part of the realty as between vendor and vendee, mortgagor and mortgagee, or between heir and executor, would not be a part of the realty under precisely like circumstances of annexation as between landlord and tenant or if it were affixed to the soil for purposes of trade or manufacture and not for the better use of the land as land. Why should not the rule be as liberal in favor of the taxing power of government, struggling for the means of existence, as in favor of a tenant against his landlord?

It has been said, and with undoubted truth, that the law of fixtures is confessedly the most uncertain title in the entire body of American jurisprudence, and that a judge might in any given case decide either way without much danger of having his judgment impeached or of failing to find some authority to support it.

*Tyler on Fixtures, 34.*

If that is so, may there not be a "well-founded doubt" in the present case?

As was well said by a former reporter of this court in a note to the case of *Minnesota Co. vs. St. Paul Co.*, 2 *Wall.*, "a fixture is one thing between landlord and tenant; a different thing between vendor and vendee; one thing in the economy of trade, another for the purposes of agriculture."

A few quotations will better illustrate the condition of the law to which attention is invited.

> "The general rule of the common law certainly is, that whatever is once annexed to the freehold becomes a part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as it can

be traced in the books, inflexible, and without exception. It was construed more strictly between executor and heir in favor of the latter; more liberally between tenant for life or in tail, and remainderman or reversioner, in favor of the former; and with much greater latitude between landlord and tenant, in favor of the tenant. But even exceptions of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade, upon principles of public policy. And to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant during his term, and were deemed personalty for many other purposes."

*Tyler on Fixtures, 54-5.*

"It is not to be disguised that there is an almost bewildering difference and uncertainty in the various authorities, English and American, on this subject of fixtures, and on the question of what passes by a transfer of the realty. One thing is quite clear in the midst of the darkness; and that is, that no general rule, applicable to all cases, and to all relations of the parties, can be extracted from the authorities.

"There has been a manifest tendency to divide this class of cases, and to apply very different rules, according to the relations of parties to each other. A rule which is prescribed for the case of a landlord and tenant is rejected as between grantor and grantee. And this distinction is observed in the case between mortgagor and mortgagee, and again modified as between the heir and the executor.

"The fact of actual and permanent annexation of the thing, personal in its nature, to the freehold, was formerly regarded as essential. But this has been found to be unsatisfactory and not fitted to meet the requirements of the law, when fixing a rule of general application, and has been abandoned as an absolute test."

"The doctrine of fixtures by which the nature and legal incidents of this property must be determined, is involved in no inconsiderable degree of uncertainty, and not settled by consistent and clearly defined principles of general application. It rests upon a long course of judicial decisions, made at different periods of time and under a variety of circumstances, and running into numerous complications and conflicting distinctions arising out of the peculiar relation of the parties and the peculiar circumstances of each particular case; so that it has been found extremely difficult to reduce this branch of the law to any consistent and uniform system.

"According to the decisions, an article may be a fixture constituting a part of the realty as between vendor and vendee, which would not, under like circumstances, be such, as between landlord and tenant; so also an article may be such fixture as between heir and executor, which under like circumstances of annexation, would not be such as between tenant for life and the remainderman or reversioner. And also according to the decisions, an article affixed to the premises for purposes merely agricultural may pass by conveyance of the freehold as a fixture, which would not be such fixture under like annexation if erected or affix for purposes of trade or manufacture; and an article attached to the realty may be removable at one period of time as a chattel, which with the same annexation at another period would not be removable because it constituted a part of the realty. In some cases it has been determined, that in order to constitute a fixture the article should be so united by physical annexation to the land or to some substance previously belonging thereto, that it cannot be detached without injury to the property; while in other cases, articles have been determined to be fixtures, and as such to pass by a conveyance of the freehold with but a slight attachment to the realty and in some instances with-

out any actual but by simply a constructive attachment."

*Teaff vs. Hewitt, 1 Ohio St., 523-4.*

"In the great case of *Elwes vs. Maw, 3 East, 38, 2 Smith, Lead. Cas., 228*, Lord Ellenborough considers the doctrine of fixtures as depending largely in its application upon the relations of the parties,which he divided into three classes: 1. Executor and heir. As between these the common law rule that whatever is affixed to the freehold, becomes a part of it, and passes with it, *quicquid plantatur solo, solo cedit*, is observed in full vigor. In this class fall also mortgagor and mortgagee, vendor and vendee, as to whom the strict rule of the common law is still in force. *Foote vs. Gooch, 96 N. C., 265.* (2) Between executor of tenant for life or in tail, and the remainderman; in which case the right to fixtures is considered more favorable for the executor. (3) Between landlord and tenant: in which case, in favor of trade and to encourage industry, the greatest latitude is allowed, so that all fixtures set up for better enjoyment of trade are retained by the tenant, though this does not include fixtures used for agricultural purposes. Where, however, they are used for mixed purposes of trade and agriculture, they are held to belong to the tenant. *Williams Pers. Prop. 16, note*, and numerous cases cited. The reason of the distinction is pointed out by Pearson, Ch. J., very succinctly in *Moore vs. Valentine, 77 N. C., 188*. When additions are made to the land by the owner, whether vendor, mortgagor or ancestor, the purpose is to enhance the value and to be permanent. With the tenant, the additions are made for a temporary purpose, and not with a view of making them part of the land; hence, for the encouragement of trade, manufacturing, etc., the tenant is allowed to remove what had apparently become affixed to the free

hold, if affixed for purposes of trade, and not merely for better enjoyment of the premises."

*Overman vs. Sasser, 10 L. R. A., 724.*

A case in New Jersey well illustrates the confusion and uncertainty on the general subject of the law of fixtures, Vice-Chancellor Bird, in what appears to be a satisfactory and well-reasoned opinion, holding one way, and the Court of Errors and Appeals, in an equally good opinion, holding the exact opposite.

*Ins. Co. vs. Semple, 38 N. J. Eq., 575-6, 583-6.*

Certainly as early as the time of Henry VII, the courts began to recognize exceptions to the law respecting annexations to the freehold, a law based on the early idea of the sacred and superior nature of property in land, and from that time forward the courts steadily introduced exceptions so numerous and so extensive as almost to have subverted the rule and these innovations have been sanctioned by courts only upon enlarged principles of public policy.

*Tyler on Fixtures, 45-6.*

If by a species of judicial legislation the courts of England and America have steadily advanced in the direction

of the relaxation of the ancient rule upon various considerations of public policy, certainly in a case involving the right of taxation, so "essential to the existence of government" as this court has declared it to be, a court ought not to hold that "the deliberate purpose of the state clearly appears" to relinquish that power, when it can do so only by invoking this ancient common law rule which authorities declare to have been almost entirel subverted, especially in a case where the question is one of first impression. As earlier decisions of this court show, the claim of exemption from taxation is so against public policy, that it will never be allowed if there is any way to avoid it.

In view of this condition of the law and in view of the newness of this case, it is difficult to declare that there is no "well-founded doubt" as to the propriety of applying this rule to such a controversy as the present one.

### C.

### In the courts of many states, the common law rule has been held inapplicable to this particular class of fixtures.

Controversies with regard to whether fixtures become a part of the realty or not, have almost always arisen in cases where it was claimed that a person had expended money or labor upon the property of another knowing that he was doing wrong, in which cases it has been held that he must lose what has been so expended. No such controversy arises in the present case. But, as will be shown, there are many cases where railroad companies wrongfully entering upon the lands of others, have constructed railroads, and the courts have refused to apply the rule so as to make the companies lose what they had expended. If this rule can properly be relaxed for the benefit of wrong-doing, trespassing railroad companies, it is difficult to discover any good reason for its rigid application against the sovereign taxing power and in favor of a corporation seeking to evade its due share of the burden of maintaining the government.

In view of these numerous decisions, made generally in favor of railroad companies, and excepting this class of fixtures from the operation of the common law rule under circumstances which at the common law would certainly have made it applicable, unless this court will declare all of the reasoning in these cases to be unsound and the conclusions reached to be wrong, it cannot logically be said that there is no "well founded doubt" as to the propriety of applying the rule in all its strictness for the benefit of a corporation possessed of an immense amount of property, enjoying the protection of the laws of the country and refusing to bear what would be its natural and just proportion of the burdens of government.

In at least thirteen states, the courts of last resort have refused to apply this rule of the common law to such fixtures as rails, ties, bridges, etc., of railroads. Attention will be called to a portion of these cases.

"The general rule of the common law certainly is, that whatever is affixed and annexed to the soil becomes a part of it and cannot be removed except by him who is entitled to the inheritance. But this rule is by no means inflexible and without exception. Trade fixtures have been held by the earliest cases in which the question arose, to form an exception. No matter how strongly attached to the soil or firmly imbedded in it, they are treated as personal property, and as such subject to removal by the person erecting them. In the leading case of *Elwes vs. Mawe, 3 East, 38*, the earlier and more important decisions upon this subject are very fully reviewed by Lord Ellenborough, and his conclusion from them, that trade fixtures and buildings for trade have always been recognized as an allowed exception to the general rule, has been acquiesced in, without an exception, as correctly stating the law. The distinction which he

makes against fixtures for agricultural purposes has been doubted, and regarded as too nice and technical, but there is no case in which the exception has not been held to apply to trade fixtures. In *Van Ness vs. Pacard, 2 Peters, 37*, the exception is recognized by the supreme court of the United States, Story, J., delivering the opinion, and the doctrine applied to a house, which had been erected as necessary to the business of a dairyman, although it was occupied as the residence of his family and those employed by him. It is also recognized and asserted in *Holmes vs. Tremper*, 20 Johns. 29; *White's Appeal*, 10 Barr, 252, and others there cited.

"Another exception to the general rule is that of structures upon the land of another, which have been erected by the builder at his own cost and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and assent of the owner of the land, the title remains in the builder; and the property is held by him as a personal chattel. Thus it is not so much the character of the structure as the circumstances under which it was erected, that will determine whether it passes with the realty or is to be treated as personal property. * * *

"We consider the property in dispute in this case as coming within both of these exceptions. The railway of which it formed an important and necessary part, cannot rationally be supposed to have been designed for any other purpose than that of trade connected with the ordinary trade and pursuits of a railway company. It certainly was not necessary to the enjoyment of the freehold, or in any manner necessary and convenient for the occupation of the land by the party entitled to the inheritance. Had it been voluntarily abandoned it is not pretended that it would or could have been used by the appellee as a railway. The conclusion cannot be avoided that it was built by the appellant with a view and for the purpose of facilitating and increasing the business and trade in which the corporators, under their corporate powers, had embarked as carriers. The railway is certainlyquite as essential to the trade and business of a railway company as a steam engine and the house which may cover it, or any other fixture can be to the miller or the miner. We do not mean to be understood as denying the doctrine laid down in *Farmers' Loan and Trust Co. vs. Hendrickson*, 25 Barbour, 484, and cited with approv-

al in *18 Md., 193*, that the road-bed of a railway, the rails fastened to it, and the buildings at the depots are real property. *Prima facie*, a house with its foundation planted in the soil is real property, yet when it is accessory to trade and in law a trade fixture, we find all the authorities regard it as personal property. The same doctrine is applicable to the railway in question. As a general rule, it would be regarded as real property, but under the circumstances of this case, coming as it does within the definition of a trade fixture, it becomes personalty, liable to the same rules of law that govern any other personal property.

"All the surrounding circumstances show that at the time this railway was laid upon the land of the appellee, it was not intended that it should be merged in the freehold. It was built at the sole cost of the appellant with its money and labor, in the reasonable belief that it had a free right of way, and under the license and by the permission of the owner of the soil. It is true that this license was not of such a character as made it irrevocable, or gave the appellant any sufficient standing in a court of equity, to obtain a decree for a specific performance, yet it was a license justifying an entry, and whatever was done under it, before its revocation, is to be regarded as legal, and not as the act of a trespasser. The road thus laid must have been intended by both parties for the exclusive use of the railway company, and that use could not have been fully enjoyed without the right to hold and control it. The appellant could not otherwise have directed its management and taken up and replaced such rails or other materials as were necessary in its judgment for the repairs and proper condition of the road.

*Northern Central R. W. Co. vs. Canton Co. 30 Md. 352-3-4-5.*

In an interesting Texas case, the railroad company had entered wrongfully on the land of another, constructed its

railroad which it used continuously for eight years, when one Hays, who had purchased the land, brought suit, in accordance with the Texas practice, in the form of trespass to try title. In this action judgment was rendered against him and he appealed; the supreme court of the state reversed the judment, rendered judgment against the company and awarded a writ of possession.

*Hays vs. R. R., 62 Tex., 397.*

Thereupon the railroad company instituted condemnation proceedings in which commissioners, appointed for that purpose, assessed the damages at $8,350, of which the sum of $8,250 was the value of the railway track and $100 the value of thirty-three acres of land taken as a right of way. Hays insisted that the first action had adjudicated his right to the land, including the improvements, and the judge of the county court held with him and that he was entitled to the value of all the improvements. The case was then taken to the court of appeals which said:

> "Section 57. We will first notice the plea of *res judicata*. Touching directly upon this subject, the doctrine announced, and the full extent to which it was announced by the supreme court in said case of *Hays vs. R. R. Co.*, 62 Texas, 397, is that "a party in possession of another's land claiming an easement is a trespasser if his claim is without foundation. If, in a suit by the owner of the soil the plaintiff shows title to the land and the defendant to the easement, the plaintiff recovers subject to the right of defendant to enjoy the easement. If the defendant shows no title of this character, the owner of the land dispossesses him altogether." Now, whilst we admit that this rule gave to appellant, owner of the land, the title to the easement or right of way which the appellant was using, appellant being a trespasser, we do not understand that the fixtures, that is, the superstructure placed by appellant upon the land, although placed there without authority, became a part of the land, and that appellant should be dispossessed thereof by said judgment. That was not the question involved in the decision of the case as presented to and determined by

the supreme court and the plea of *res judicata* was not sustained by the evidence.

"Sec. 58. The general rule is that fixtures once annexed to the freehold become part of the realty. But to this rule there are exceptions; as, for instance, where there is a manifest intention to use the fixture in some employment distinct from that of the occupant of the real estate. Mr. Pierce in his standard work on railroads, discussing improvements made by a railroad company during an illegal possession of land, says: 'The laying of the rails or similar structures differs essentially from the ordinary transaction of placing fixtures on real estate, and is not governed by the same rules.' *(Pierce on Railroads, 219.)* It certainly is by law made the duty of a railroad company seeking to take and appropriate the lands of the owner to its own use to ascertain, in the manner provided by law, the compensation to which such owner is entitled and to make paymnet thereof before occupying the premises. Failing to do this, the company is a trespasser, but though such is the status of the company in the eye of the law, yet as was said by Chief Justice Brickell in *Jones vs. R. R. Co.*, 70 Ala., 227, "The neglect of the duty, the wrongful entry and possession, does not preclude the company from resorting subsequently to the proper proceeding for the acquisition of the land and of consequence availing itself of all the structures it may have placed thereon. (Justice vs. R. R. Co. 87 Pa. St., 28.; Secombe vs. R. R. Co., 23 Wall. 108.)"

*R. W. Co. vs. Hays, 3 Tex. Ct. of App., C. C., Sec. 57-8.*

"The railroad company was a trespasser in constructing its road upon land over which it had not acquired the right of way, but it still had the right to acquire the right of way unaffected by the liability incurred for its trespass. The trespass committed is not involved in the determination of the due compensation. The contiuing right of the company to secure

the right of way, in accordance with its charter, and the nature of its entry on the land annexing chattels to the soil, distinguish the case from that of a trespasser who affixes chattels to the freehold, and the rule of the common law, established when railroads were unknown, is not applicable."

*R. R. Co. vs. Dickson, 63 Miss., 385.*

"The appellee having entered upon lands without the consent of the owner, without instituting the necessary proceedings for the ascertainment of the compensation to which the owner was entitled and its actual payment in money as required by the constitution, was a trespasser. The owner could have supported an action of trespass against it or an action of ejectment, and could have enjoined it by bill in equity from the construction of its road, until the compensation was ascertained and paid. *Pierce on Railroads, 166-7; N. O. & Selma R. R. Co.*, and *Imm. Asso. vs. Jones*, at last term.

It is, as insisted by the counsel for the appellant, a maxim of the common law, that everything affixed to lands became a part of the freehold, subject to all its incidents and properties, and cannot be dissevered, or converted into personal property, without the act or consent of the proprietor of the lands. The maxim was never inflexible in its operation, and as far back as it may be traced, was subject to exceptions. *Van Ness vs. Pacard*, 2 Peters, 137; *N. C. R. R. Co. vs. Canton*, 30 Md. 347. These exceptions have multiplied with the increase in importance and value of personal property, and the varied necessities and exigencies of society. It is, nevertheless, true, generally, that if there is a tortious entry upon lands, and the tort-feasor makes improvements upon them, annexed to the soil for the better use and enjoyment of the lands, such improvements become a part of the realty. All property in them is vested in the proprietor of the soil, who is under no legal or equitable obligation to make compensation for them, or to suffer them to be dissevered and removed. *2 Kent*, 338. It was the fraud or folly of the tort-feasor to build, to plant, or to sow, on the lands of another, without his consent. *Amos & Ferard on Fixtures, 10.*

This maxim seems to us incapable of any just application to parties standing in the relation of these parties, or to a proceeding of this character; and it

must not be overlooked, that they have corresponding rights and remedies. In this relation, they are placed by law. The rights of each party, the law distinctly defines; and the remedies each must pursue to secure and enforce their rights, are clearly prescribed. It was the right of the appellee to acquire the lands for the use of the road; a public, not a private use. Appropriate proceedings for its acquisition, if from any cause it could not be acquired by contract with the owner, the law prescribes. Just compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant. If there was an entry upon and appropriation of the lands without the consent of the owner, and without having the compensation ascertained and making payment of it, there were remedies to which he could have resorted, protecting himself, regaining his possession, and compelling the ascertainment and payment of the compensation. If he is negligent, if he stands by in silence, suffering the wrongful entry or continuance of possession under it, the construction of costly improvements, not necessary to the enjoyment of the freehold, inconvenient to his use and occupation, valuable to him only because he may dissever them, converting them again into personal property, and valuable only to the party making them for the uses to which they are dedicated, there is but little of equity in a claim that the measure of his compensation shall be increased by the value of the improvements, or that the time at which such compensation is to be estimated shall be varied. *Nemo debet locupletari ex alterius incomodo* is a maxim of the common law of as much force, though it may not be of as general application, as the maxim *quicquid plantatur solo, solo cedit.*

The duty rested upon the appellee before the taking and appropriation of the lands to have caused in the appointed mode the ascertainment of the compensation to which the owner was entitled, and to have made payment of the compensation. Neglecting this duty the entry upon and possession of the lands was wrongful, no title to them was acquired and the title of the owner was not divested. The neglect of the duty, the wrongful entry and possession, does not preclude the appellee from resorting subsequently to the proper proceeding for the acquisition of the lands, and of consequence availing itself of all the structures

it may have placed thereon. *Justice vs. N. Y. R. R. Co., 87 Penn. St., 28. Secombe vs. R. R. Co.*, 23 Wall., 108. Though the appellee was a trespasser by reason of the neglect to pursue the proper remedy for acquiring the lands—acquiring them without the consent of the owner—there is in the right continuing in him to pursue the remedy, rendering the possession rightful, and bywhich title may be acquired, a plain distinction between the appellee and a common trespasser. As against such trespasser, the proprietor can keep the lands, and, keeping them, hold the improvements he may have annexed to the soil. No remedy is given the trespasser by which he may acquire the use and enjoyment of, or title to, the lands. There is also another distinguishing fact; the structures of the appellee were dedicated, not to the use and enjoyment of the freehold, but to public uses which are the consideration for the grant to the appellee of corporate franchises and of the right, in the exercise of these franchises, to take and appropriate private property. *Justice vs. N .V. R. R. Co., Supra.; N. C. R. Co. vs. Canton, Supra; Morgan vs. N. V. Co.*, 39 Mich., 575; *Lyons vs. J. V. & M. R. R. Co.*, 42 Wis. 538. These elements of the case distinguish it from that of the trespasser entering upon lands, affixing chattels to the freehold for its use and enjoyment, which he must intend to convert into realty and which following the title to the soil, as one of its incidents, pass to the proprietor."

*Jones vs. R. R. Co., 70 Ala., 230-1-2.*

In Ohio the owner of lands in 1854 granted to a railroad company and its assigns, "the right of use of a strip of land, not exceeding one hundred feet wide, on and over the lot described below for a railroad;" and the writing evidencing this grant contained a further provision which indicated that the railroad company should have exclusive possession of the said one hundred feet. It will be seen

that by this grant the railroad company was to have exclusive and perpetual use and possession of the strip of land quite as much as the Atlantic & Pacific railroad under the grant by Congress. The only contemplated termination in either case would be the abandonment of the railroad or the termination of the life of the company. The Ohio company constructed its road and built a bridge across the Maumee river, putting on the said land eleven piers and abutments of stone masonry, and in the spring of 1855 the building of the railroad was abandoned, the stone in the piers and abutments being left on the premises. In 1867 the railroad company sued the owner of the land because he had prevented the removal of the stone in the piers and abutments, and it was contended on his behalf that these structures were fixtures and upon the abandonment of the railroad by the company remained a part of the realty and became the property of the owner of the land. The court held that the structures did not become a part of the realty, but belonged to the railroad company and could be removed without the consent of the owner of the land, putting this decision upon the ground that these structures were destined for use in connection with the railroad in its transportation of persons and property and not for the purpose of improving the realty. The following quotation from the opinion will indicate the reasoning of the court:

> "The use of the strip of land on which the piers were built was granted to the railroad company for the purpose of constructing part of a continuous line of railroad which it was authorized to build and operate. The piers were as much a part of the road as the bridges they were designed to support, or the rails and ties on the road. The use the road was intended to subserve and to which alone it was adapted, was the transportation of persons and property. The road and all its parts were merely accessory to this business, and were put on the land for this purpose, and not as accessories to the land over which the road was to pass. The part of the road built on the premises of the plaintiff in

error, disconnected from the other parts of the road, could not be operated, and would be useless as a railroad. Nor could it serve any useful purpose as an appurtenance to the land on which it was built."

*Wagner vs. R. R. Co., 22 Ohio St., 577-8.*

"The argument on behalf of the defendant on the first point is, that the plaintiffs, in constructing the railroad track, were trespassers, and that the track, being attached to the soil, became a part of the realty, and belonged to the owner of the land. Hence he claimed that its value ought to be included in the estimate of damages, in like manner as though the defendant had himself built the road. But this proposition cannot be maintained. Neither the constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond a 'just compensation.' He is to be paid the damage he actually suffers and nothing more. But, to hold that, in addition to the fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of a railroad track in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over technical construction of it."

*R. R. Co. vs. Armstrong, 46 Cal., 90-1.*

In a Minnesota case, where a railroad company had wrongfully constructed its road over land of another, in subsequent condemnation proceedings the court held, on

broad grounds of equity, that the owner was not entitled to compensation for rails, ties, etc., but a concurring judge, dissenting from that line of reasoning, and referred to *Justice vs. R. Co., 87 Pa. St., 28*, as furnishing reasons "much more sound and satisfactory."

*Greve vs. R. R. Co., 26 Minn., 68-71.*

In a case in Mississippi, brought by the holder of a tax deed for the fractional thirty-eight acres in the S. E. ¼ of N. W. ¼, etc., against a railroad company which had wrongfully laid its track over a portion of the land, the court held that while the land covered by the right of way belonged to the holder of the tax title, yet the superstructure placed thereon by the railroad company did not go with the land upon which it was laid.

*I. C. R. Co. vs. Le Blanc, 21 So., 761.*

In the following cases, also, the courts have refused to consider such railroad improvements as becoming parts of the realty.

*Morgan's Appeal, 38Mich., 679.*
*Ry. Co. vs. Dunlop, 47 Mich., 465.*
*Lyon vs. Ry. Co., 42 Wis., 544-5.*
*Daniel vs. R. R. Co. 41 Iowa, 53.*
*R. R. Co. vs. Morgan, 42 Kan., 23.*

"The theory upon which the court below proceeded was, that the plaintiff, having entered upon the land without the consent of the owner, and without having instituted the necessary proceedings required by statute for the ascertainment of damages or compensation to which the defendant was entitled, and the payment of the same, was a trespasser; and that the rails, ties and other structures which the plaintiff had affixed to the lands in the mode ordinarily done for railroad purposes, became a part of the freehold and vested in

the proprietor of the soil. It is evident from the language of the instructions, that the court applied the common law maxim *quicquid plantatur solo, solo cedit,* with ancient rigor and strictness, and regarded the fact of attachment to the soil of structures as decisive of their character as fixtures, and the right of the owner of the land to them.

"The old rule, that all things annexed to the realty become a part of it, has been much relaxed, and several exceptions recognized; as where the intention is manifest to use the alleged fixtures in some employment distinct from the use of the soil or husbandry, or where the chattel has been affixed for the purposes of thade or the mechanical arts. In modern times, for the encouragement of trade, manufactories and transportation, and owing, no doubt, in part to the increased value and importance of personal property, many things are now considered as personalty which are attached to the soil. The necessities and convenience of an advancing civilization have demanded a relaxation of the strict rule, so that now attachment to the soil is only one of several conditions to help in determining whether a given thing belongs to the realty. The books indicate that various considerations have been applied by the courts in the determination of this question; and that few decisions, although involving fixtures of a similar character, can be considered of absolute authority for its disposition; but in the nature of things every case must depend more or less upon its own special facts and peculiar circumstances. *(Schouler on Personal Property, Sec. 117.)*

"In *Railroad Company vs. Deal, 90 N. C., 111,* the exceptions to the general rule and the reasons for them are clearly and distinctly stated by Merriam, J., who said: ' The general rule of law is that buildings and other structures erected on land for the better enjoyment of it become identified with it, part of, and go with the land, and the tenant has no right at any time to remove them. Anciently, the law was more strict in respect to making things erected upon and attached to the land, directly or ~~indirectly~~, a part of the freehold, than in modern times. As civilization has advanced and trade and the mechanic arts and other industries have multiplied and increased in development, and correspondinly in their necessities and wants of reasonable convenience, there has been a growing relaxation of the strict rules of law men-

tioned in their favor. It is the policy of the law to encourage trade, manufactories and transportation, by affording them all reasonable facilities. Buildings, fixtures, machinery and all such things certainly intended and calculated to promote them, are treated, not as a part of the land, but as distinct from it, belonging to the tenant, to be disposed of or removed at his will and pleasure. Hence, if a house or other structure is erected upon land only for the exercise of trade and agriculture, no matter how it may be attached to it, it belongs to the tenant, and may be removed by him during his term, and in some classes of cases, after it has ended; though the tenant after his term is over would, in going back upon the land to get his property, be guilty of a trespass and except in that respect the property would remain his. The exceptions to the general rule pointed out before are well settled, and the practical difficulty in any case arises in pointing out when the general rule or exception applies. The exception does not depend on the character of the structure or the thing erected, or whether it is built of one material or another, or whether it be set in the earth or upon it; but whether it is for the purpose of trade or manufacture, and not intended to become identified with and part of the land.'"

*R. & N. Co. vs. Mosier, 14 Oreg., 520-1-2.*

Of course in the present case, appellees now declare that the additions to the land were intended to be permanent and to enhance the value of the land itself, but the court will judge as to the nature of the additions as a matter of law, not by the present declarations of interested parties, but from all the facts concerning such additions. As was well said in a Massachusetts case, "The intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act."

*Hopewell Mills vs. Savings Bank, 150 Mass., 521.*

The improvements in question are not permanent, but constantly changing as they are taken up and replaced by others from time to time, and are also subject to lawful change by a change of location of the line of railroad, a sort of change which is frequently made on these long lines of railroads and which has been frequently made on this very road. It will not be pretended that for the purpose of straightening its line, of avoiding heavy grades, or providing better crossings of rivers, the company may not lawfully change its line, as it has done, and locate a new right of way through the public domain. There can be no doubt either that in case of such changes they could lawfully take up and remove from the abandoned portion of the land all of the rail, ties, bridges, culverts and telegraph lines for use elsewhere, and that the land thus abandoned would revert to the government.

The citation of these cases, and the argument based on them, may, at first glance, appear inconsistent with the position of appellant that the improvements in question are real estate, but this is not the fact. Appellant seeks to tax these "improvements" as "real estate" solely on account of the statutory definition of those terms contained in section 2807 of the Compiled Laws of New Mexico of 1884, which is printed with the opinion of the court. This is distinctly set out in appellant's briefs, and was also stated on the oral argument.

## V.

**In deciding the three cases the court has failed to notice a material difference between the case for Valencia county taxes and the cases for Bernalillo county taxes.**

Cases numbered 106 and 170 were brought to recover taxes levied in the county of Bernalillo. The agreed statement of facts set out in the opinion of the court was made in case 106 only. Case No. 169 was brought for taxes levied in the county of Valencia, and, as appears by the record in that case at pages 80 to 84, 60.7 miles of the railroad run over land which was held in private ownership at the time of the grant. This fact is admitted by defendants, the mileage, however, being put at "about 58 miles." Attention was called to this difference in the original brief for appellant, but it does not appear to have attracted the attention of the court.

By reference to the act of congress it will be seen that the second section is the one which grants the right of way through public land, and is the one which contains the clause exempting the right of way from taxation. By every rule of construction the right of way exempted from taxation must be held to be the one granted by that name in the same section which contains the exempting clause, and that is only through the public land.

The right of eminent domain is conferred on the railroad company by section seven of the act of Congress, but in that section the phrase "right of way" is not used, but, after detailing the various steps which may be taken to acquire the land, it is declared that the company shall "thereupon acquire full title to the same for the purposes aforesaid."

It may well be argued that while Congress was willing to exempt from taxation any portion of the public domain which might be taken by the railroad company for its use, yet it was not willing to withdraw from taxation land already held in private ownership and subject to be taxed. The difference in the language of the two sections, the

careful avoidance of the term "right of way" as to the land acquired from private ownership, strongly countenances this view. Certainly there is enough in this difference in the language to admit of "reasonable contention" and to establish the existence of something more than a "well founded doubt" as to the intent of Congress to exempt the land held in private ownership at the time of the grant.

Certainly as to these sixty and seven-tenths miles in Valencia county, the decision of the supreme court of New Mexico is wrong and should be reversed to this extent, at least, and the case remanded for proper proceedings as to the tax levy upon this portion of the railroad. There is no difficulty about this as will be seen by reference to the record at pages 80-1, where it will be seen that this portion of the railroad was assessed separately from the other portion which runs over what was public domain at the time of the grant.

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It is respectfully submitted that the foregoing statement shows that there is much involved in the decision of the cases as to which there has been no argument before the court, and some matters of importance which the court appears not to have noticed: and that the ends of justice will be best served by giving opportunity for a full presentation of the views of counsel as to such things, upon a rehearing.

F. W. CLANCY,
Counsel for Appellant.

No. 169.

FILED
APR 3 1899
JAMES H. McKENNEY,
Clerk.

PETITION FOR REHEARING. Con rehear

Brief of Clancy for Appt.

# Supreme Court of the United States,

OCTOBER TERM, 1898.

Filed April 3, 1899.

*No. 169.*

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TERRITORY OF NEW MEXICO, *Appellant,*

VERSUS

UNITED STATES TRUST COMPANY, ET AL.

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## APPEAL FROM NEW MEXICO.

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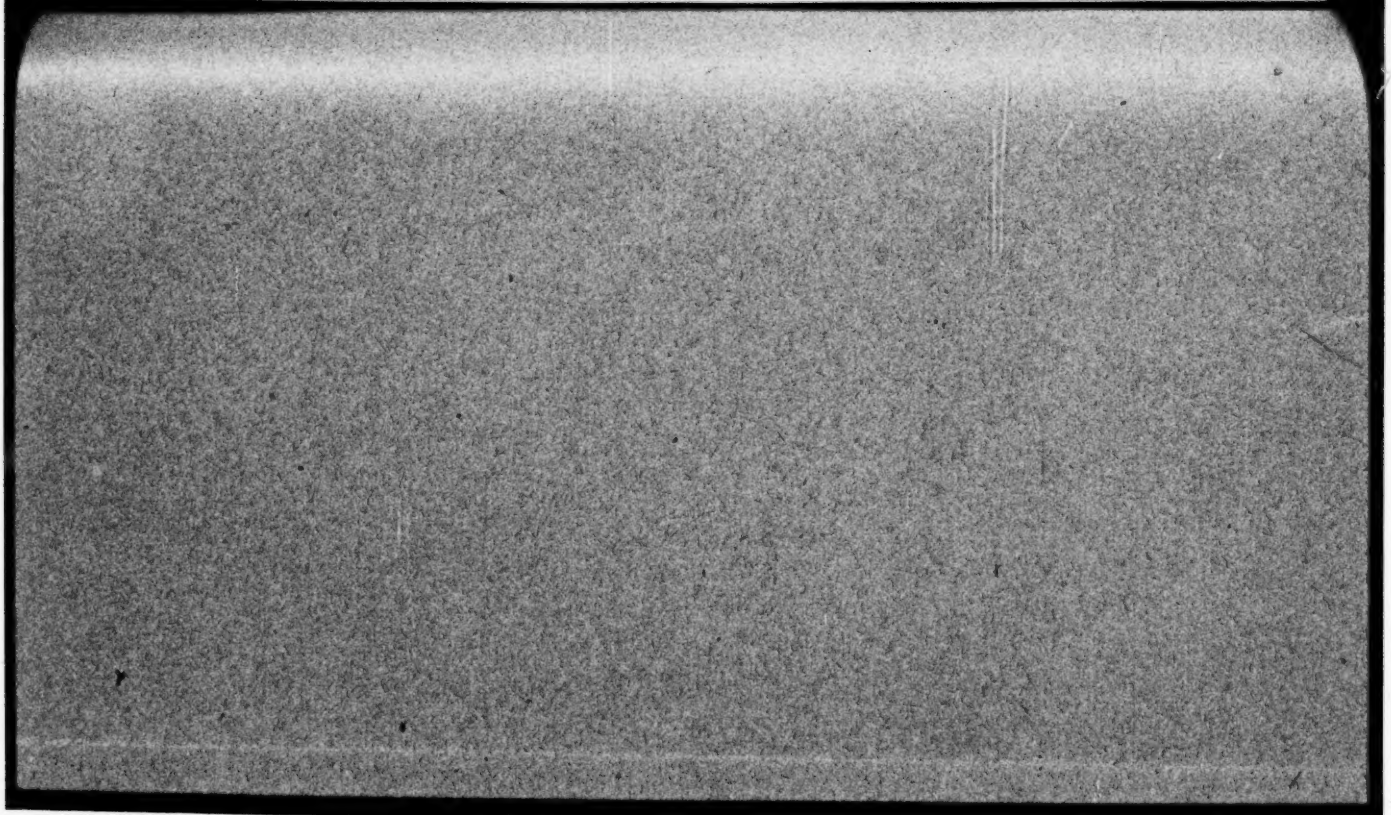
F. W. CLANCY,
*Solicitor for Appellant.*

NEW MEXICAN PRINTING COMPANY, SANTA FE, N. M.



# Supreme Court of the United States,

OCTOBER TERM, 1898.

Territory of New Mexico,
vs.
United States Trust Company, et al. } No. 169.

*To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Your petitioner, the Territory of New Mexico, appellant in the above entitled cause, in accordance with the permission granted by the court on the 6th of March, 1899, respectfully prays the court to order a rehearing of this cause for the reason that the court has failed to notice a material difference between this case, which relates to taxes in Valencia county, and cases numbers 107 and 170, which relate to taxes in Bernalillo county, the three cases having been argued together, the difference being that in Valencia county only a little over one third of the railroad runs over what was public domain at the time of the passage of the act of Congress which granted the exemption from taxation, and no exemption was granted or intended by the second section of the act, as to lands held in private ownership and thus already subject to taxation by the territories. And your petitioner in accordance with the permission of the court, respectfully submits herewith as a part hereof, a brief on the question of the validity of so much of the taxes imposed in Valencia county as were levied upon that portion of the railroad running

through what was private property at the time of the passage of the act of Congress.

TERRITORY OF NEW MEXICO,
by F. W. CLANCY,
Solicitor for Appellant

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I certify that I have examined the record in the case referred to in the foregoing petition for rehearing, and that, in my opinion, said petition should be granted.

F. W. CLANCY,
Solicitor for Appellant.

## BRIEF.

In taking advantage of the leave given to present a petition for a rehearing in this cause, and a further brief as to the validity of the Valencia county taxes, it will be assumed for the purposes of the present argument that the decision of the court, so far as the two Bernalillo county cases are concerned, and so far as this case affects that portion of the railroad which runs over what was public domain in July, 1866, is to be taken as established law. This assumption is necessary to a proper discussion of the single question to which attention is invited, because that question can be of no practical importance unless the decision as made is to remain unaltered. A moment's reflection will show this to be so. The distinction to which attention has been drawn between the condition of land which was public domain and granted by Congress by the second section of the act, and land which was private property and acquired under the seventh section of the act, is of no consequence unless the court adheres to what it has decided as to the proper construction of the second section.

Of course, this may necessitate an argument from a somewhat different point of view from that heretofore occupied by appellant, but this is not to be regarded as any abandonment of the positions taken in the former petition for rehearing in all of the cases, which is still pending, and which it is earnestly hoped may yet be granted by the court.

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As a matter of convenience it may be well here again to summarize what the court has already decided as to the second section of the act of Congress, as an assistance to the intelligent consideration of what is to follow:

The court has in effect decided two things:

First. That congress in granting "a right of way" in 1866 intended to grant something, which

the court does not positively or exactly define, but which was corporeal property, (notwithstanding the fact that at that time, and for years thereafter, such a meaning for "right of way" was unknown); and

Second. That Congress intended to exempt the railroad and telegraph line from all taxation where tney might run through the public domain in the territories, this intention being evolved only by the application of the common law rule that whatever is affixed to realty becomes a part thereof.

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It will also be well at this point for convenience of reference, to set out in full the two sections of the act of Congress which are to be considered.

They are as follows:

SEC. 2. And be it further enacted, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic & Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables, and water stations, and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the Indians, and only by their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation to the road named in the act.

SEC. 7. And be it further enacted, that the said Atlantic & Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take, and hold any lands or

premises that may be necessary and proper for the construction and working of said road, not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterest ed commissioners, who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid. And either party feeling aggrieved at said appraisement may, within thirty days after the same has been returned into court, file an appeal therefrom, and demand a jury of twelve men to estimate the damage sustained; but such appeal shall not interfere with the rignts of said company to enter upon the premises taken, or to do any act necessary and proper to the construction of its road. And said party appealing shall give bonds, with sufficient surety or sureties, for the payment of any cost that may arise upon such appeal; and in case the party appealing does not obtain a verdict more favorable, such party shall pay the whole cost incurred by the appellee, as well as his own, and the payment into court, for the use of the owner

of said premises taken, at a sum equal to that finally awarded, shall be held to vest in said company the title of said land, and the right to use and occupy the same for the construction, maintenance, and operation of said road. And in case any of the lands to be taken, as aforesaid, shall be held by an infant, *femme-covert*, *non-compos*, insane person, or person residing without the territory within which the lands to be taken lie, or persons subjected to any legal disability, the court may appoint a guardian, for any party under any disqualification, to appear in proper person, who shall give bonds, with sufficient surety or sureties, for the proper and faithful execution of his trust, and who may represent in court the person disqualified, as aforesaid, from appearing, when the same proceedings shall be had in reference to the appraisement of the premises to be taken for the use of said company, and with the same effect as has been already described; and the title of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust. And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee-simple, shall be estimated and determined in the manner hereinbefore set forth. And in case it shall be necessary for the company to enter upon any lands which are unoccupied, and of which there is no apparent owner or claimant, it may proceed to take and use the same for the purposes of said railroad, and may institute proceedings, in manner described, for the purpose of ascertaining the value of, and of acquiring a title to, the same; but the judge of the court hearing said suit shall determine the kinds of notice to be served on such owner or owners, and he may in his discretion appoint an agent or guardian to represent such owner or owners in case of his or their incapacity or non-appearance. But in case no claimant shall appear within six years from the time of the opening of said road across any land, all claims to damages against said company shall be barred.

The question now is as to whether Congress by

the language of exemption in the second section of the statute, intended to exempt also the railroad and telegraph line running over land which might be acquired under the seventh section from private owners.

In the examination of this question as in all others relating to claims of statutory exemptions from taxation, we are to be guided by the salutary rule of construction heretofore laid down by the decisions of this court and expressly affirmed in the last paragraph of the opinion in the present case, which will be well shown by a few brief quotations. This court has held:

That "exemptions from taxation are to be strictly construed;" (*164 U. S., 666.*)

That "when the language used admits of reasonable contention, the conclusion is inevitably in favor of the reservation of the power" to tax: (*146 U. S. 294.*)

That "there must be no doubt or ambiguity in the language used upon which the claim to exemption is founded;" (*161 U. S., 146.*)

That "no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption where such claim is not founded upon the plain and clearly expressed intention of the taxing power;" (*161 U. S., 146.*)

That "the existence of a well founded doubt is equivalent to a denial of the claim:" (*161 U. S., 177.*)

That "nothing can be taken against the state by presumption or inference;" (*18 Wall. 226.*)

*R. R. Co. vs. Dennis, 116 U. S., 668–9.*

In short, as is distinctly stated in *18 Wall. 226*, to justify a claim of exemption from taxation, the proof of intention to exempt must, like that which will authorize conviction of crime, "be clear beyond a reasonable doubt."

## POINTS AND AUTHORITIES.

### I

**By the very terms of the second section of the statute, the grant and exemption are co-extensive, and extend to nothing beyond that section.**

Let us look at this section in which only the exemption appears, and see what is thereby granted, and what is exempted, without at this time troubling ourselves as to the meaning of the terms which set out the subject of the grant and of the exemption.

This section declares "that the right of way,"—not *a* right of way—, "through the public lands"—not merely in the territories but in the states as well,—"be and the same is hereby granted to the said Atlantic & Pacific" etc. It further declares that "said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain",—whether in Missouri, Kansas, New Mexico or California,—"and the right of way shall be exempt from taxation within the territories of the United States."

"The right of way through the "public lands" is granted; and "the right of way shall be exempt from taxation within the territories of the United States." Clearly that which is exempted from taxation is the same thing as that which is granted, whatever it may be, except that the exemption is limited to the territories. No other "right of way," is mentioned or hinted at. "The right of way" is granted, and "the right of way" is exempt,—nothing more.

This is a conclusion which "simply rests on the terms of the statute" and is in harmony with those rules of construction, so often enunciated by this court, which assert that "exemptions from taxation are to be strictly construed," and that "no implication will be indulged in" which will have the effect of

expanding the ordinary meaning of the language used.

But the burden is not on the territory to show the limited character of the grant. The *onus* is on the appellees to show its more expanded character, and all that appellant need do to defeat the claim, is to indicate "the existence of a well-founded doubt," which this court holds is fatal to any such claim of exemption.

## II.

**The seventh section of the act does not authorize the railroad to acquire from individual owners the same estate in lands, which the court holds was granted by the second section.**

Counsel for appellant feels compelled to state that his own construction of the seventh section, if unembarrassed by the decision of the court which still stands, would be that thereunder the railroad company could acquire only an easement,—a mere right of way in the strict sense of the term,—and for this construction would rely upon the general principle that the taking of private property for public use must be as limited as possible consistent with the public interest, and would cite the opinion of this court as to acquisition of lands under such a statute by railroad companies.

This section gives the company the power "to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road." In Alabama, by the terms of its charter, a railroad company, this court says, "was given power to purchase, hold, lease, sell and convey real, personal and mixed property, so far as it should be necessary for the purposes mentioned in the act, namely, to construct and operate

the specific railroad authorized therein." Clearly this was a broader power than that given to the Atlantic and Pacific Company, which can only "purchase, take and hold" lands; and yet this court held that under that power, the company acquired "merely an easement on the land."

*East Alabama R. Co. vs. Doe, 114 U. S., 350–1.*

And a distinguished member of this court once declared, in a state where the statute clearly authorized the appropriation of the fee or the use, "that, unless the proceedings affirmatively show that the fee is sought to be taken, nothing is taken but that which is needed, and that is the use."

*Keener vs. U. P. R. Co., 31 Fed., 128.*

As has been well said in a case from which quotation has already been made in a former brief in these cases:

> "The doctrine of eminent domain rests upon the presumed necessity for the taking of private property for public use. The taking, to be consistent with this theory, must therefore ordinarily be limited to the apparent necessities of the public."
>
> *Railway Co. vs. Telford, 89 Tenn. 297.*

In numerous cases the taking of land by railroad companies, whether by purchase, or under the power of eminent domain, no matter how strong the words of conveyance or how broad the terms of the statute, has been held to vest only an easement, the use only, a mere right of way. Some of these cases have been set out with some fullness in the petition for rehearing heretofore filed, and will be only cited here.

*Jones vs. Van Bochove, 61 N. W., 343.*
*Blakely vs. R. R. Co., 64 N. W., 972–3.*
*Robinson vs. R. R. Co., 59 Vermont, 426.*
*Kellog vs. Malin, 50 Mo., 499.*

*Railway Co. vs. Telford, 89 Tenn., 297.*
*Quimby vs. R. R. Co., 23 Vt., 393.*
*M. & O. R. Co. vs. Postal Tel. Co., 41 L. R. A., 406.*
*Taylor vs. R. R. Co., 38 N. J. L., 30.*
*Nelson vs. Fleming, 56 Ind., 322.* (Dissenting opinion of Biddle, J.)

The court may well find reasons, founded on both principle and precedent, for applying to the construction of the seventh section, which authorizes the taking of private property under the delegated sovereign power of eminent domain, a very different line of reasoning from that which it applies to the second section by which Congress exercises its power over the public property of which it makes a direct donation, unhampered by any consideration as to the rights of individual owners or the withdrawal from taxation of property already subject thereto.

There may be a well-defined difference as to the meaning which the court gives to the second section where Congress deals with the public domain, over which it has unlimited control, and that which it will give to the seventh section which deals with the taking of private property for public use. As to the former, it may be held that there is no consideration, whether constitutional or of public policy, by which to restrain, limit or qualify the language used, or even to prevent an expansion, by implication, of the language used; while as to the latter, it might be held that very different considerations arise as to the exercise of the sovereign power of taking private property for public use, and that the case in *114 U. S. 350*, furnishes the proper rule.

In the light, however, of the reasoning of the court as to the nature and character of railroads and their business, the necessity for exclusive occupation of land used for their purposes, and the consequent conclusion that they must have more than an easement

in such land, and, if possible, the fee, it would seem that the court has destroyed all foundation for any argument to limit or restrain the language of the seventh section so that the company can thereunder acquire only the use of the land of private owners.

But no matter which construction is given to the seventh section, whether the company acquires only an easement thereunder or a full title in fee, it is equally clear that the exemption of what was granted in the second section, cannot be considered applicable, as the estate is different from that which the court says was granted by Congress in the second section.

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An examination of the language of the seventh section is convincing that its natural import, unrestrained by any such considerations as those above adverted to, is to authorize the railroad company to acquire a title in fee to the land necessary for its purposes, subject only to the limitation, perhaps, that it shall be used only for railroad purposes. The first lines of the section, which has been hereinbefore quoted in full, authorize and empower the company "to enter upon, purchase, take and hold land or premises that may be necessary and proper for the construction and working of said railroad." Further along it is provided that compensation shall be made to the owner, to the extent of "the value of the premises taken." In case the owner and the company can not agree as to such value, commissioners are to be appointed who "shall appraise such premises at what would have been the value thereof if the road had not been built;" and upon the payment of the amount of the appraisement into court "said premises shall be deemed to be taken by said company, which shall thereby acquire *full title* to the same for the purposes aforesaid." There are further provisions for an appeal from the appraisement and for the payment of

costs by the party appealing if he does not obtain a verdict more favorable; and the payment into court of a sum equal to that finally awarded, "shall be held to vest in said company the title of said land." Then there are provisions as to the taking of lands of persons under disabilities, which shall have the same effect as those concerning the lands of other persons, "and the *title* of the company to the lands taken by virtue of this act shall not be affected or impaired by reason of any failure by any guardian to discharge faithfully his trust." Provision is also made for the acquisition of any right or claim to land or any interest therein which may be "less than a fee simple." In case of unoccupied lands proceedings may also be instituted "for the purpose of ascertaining the value of, and of acquiring title to, the same."

It is to be noted that all of the language used in this section looks toward the acquisition of absolute ownership of the land. The company is authorized to purchase, take and hold the land; the damages to be assessed are to be the value of the land, and it is repeatedly asserted that the company shall acquire *full title* to the land. The provision for acquiring interests less than a fee simple, in itself implies that the other provisions mean the acquisition of a full title in fee. It is to be noted that nowhere in this section is it stated that the company shall acquire a "right of way," whatever that phrase may mean.

This court, in its opinion, has not undertaken to classify or nominate the interest which was granted under the term right of way. It is so far new to the jurisprudence of the country that we cannot be sure of its name or precise nature. It is made certain only that it "is real estate of corporeal quality."

Now, the unnamed, amorphous estate of corporeal quality which the court holds was granted by the name "right of way" in the second section, certainly

does not constitute the same sort of title as that obtained under the seventh section, which is defined to be "full title" to the land "for the purposes aforesaid." There can be no doubt as to the sort of title intended by this language when viewed in the light shed on the subject by the argument in the opinion of the court as to the nature and character of railway companies and of their business, which require exclusive use and occupation of the land. Clearly "full title," thus viewed, must mean a complete estate in fee, and "for the purposes aforesaid" cannot be held to do more than limit the uses to which the company may put the land.

If it were merely doubtful as to whether the title which may be acquired under the seventh section is the same title as that granted by Congress in the second section, according to the well-settled rule of construction hereinbefore referred to, the doubt must be resolved in favor of the appellant, as "a well founded doubt is fatal to the claim ' of exemption.

III.

**The assessments are so made as to show separately the property which is on land which was public domain at the time of the grant and on land which was held in private ownership.**

The correctness of this statement will be at once seen by reference to pages 80 to 84 of the printed record, where there will be found one assessment of the property on land which was public domain of the United States when the right of way was granted, 33 miles in length, and another item of assessment of like property on land which was held in private ownership at the time of the grant, 60.7 miles. This separation of the two classes of property, taken in connection with the allegations of the intervening petition of appellant, which petition appears at pages

30 to 32 of the printed record, makes it perfectly easy to ascertain exactly how much is due upon that portion of the property assessed which is upon land formerly held in private ownership.

Any question as to the irregularity or correctness of the assessment is not before this court at this time. Certain pleas were filed by defendants in the district court which set up some defenses of this character, but they were never considered by the court below as will be seen by reference to pages 77–8 of the printed record. The district court refused to pass upon the question of the sufficiency of the pleas for the reason that the petition and matters therein set up, fell within the decision of the supreme court of the territory in the matter of a like previous petition, and were therefore not sufficient to entitle the petitioner to the relief sought, and the petition was accordingly dismissed.

The record is not in such condition that this court could pass finally upon the correctness and legality of these assessments, if any ground of objection thereto exists, but the appellant is quite prepared to maintain the propriety and legality of the assessments and of all that is claimed thereunder.

It may be well, however, to call attention to the sections of the statutes under which these assessments were made, and which are referred to in the assessments themselves as sections 2847 and 2848. Those numbers referred to the Compiled Laws of 1884, and the same sections are now to be found in the later compilation of 1897, as numbers 4055 and 4056, and read as follows:

> SEC. 4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of.

county commissioners, with all arrearages of taxes, which should have been assessed and paid in former years, charged thereon, or in case of the failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

SEC. 4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list, following the entries made by the clerk, and such entries shall be designated as, Additional assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

In the pleas of defendants it is not in any way suggested that any appeal was ever taken to the board of county commissioners, as provided in the last quoted section, nor that the interested parties were in any way deprived of an opportunity so to appeal.

*Stanley vs. Supervisors, 121 U. S., 550.*

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It is respectfully submitted that the matters herein treated of, were not considered by the court when its former decision was made, the distinction between this case and the others with which it was argued not having attracted the attention of the court; and that they are of sufficient importance to require that opportunity be given for their full presentation.

F. W. CLANCY,
Counsel for Appellant.

...E FOR APPELLANT ON RE-HEARING.

...ber Oct. 25, 1899.

...me Court of the United States.

OCTOBER TERM, 1899.

No. 1...

...E TERRITORY OF NEW MEXICO, APPELLANT,

v.

...HE UNITED STATES TRUST COMPANY OF NEW YORK, ET AL.

...PEAL FROM NEW MEXICO.

F. W. CLANCY,
*Solicitor for Appellant.*

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1898.**

**No. 169.**

TERRITORY OF NEW MEXICO
*v.*
UNITED STATES TRUST COMPANY, OF NEW YORK, *et al.*

## Additional Brief for Appellant on Rehearing.

In taking advantage of the leave given to file an additional brief in this case, it is not the intention of counsel for appellant to add to what has already been said in former briefs on the merits of the question now under consideration. The matter has been sufficiently presented for the court to see what is involved, and it does not now seem that anything can be added, on paper, which can assist the court in its deliberations upon the merits.

There are, however, some things urged in the brief for appellees, filed on the 3d of April, 1899, which call for reply. That brief is devoted principally to an attempt to show that "this court ought not to consider the question sought to be presented." Perhaps the fact that the court proposes to consider it, as shown by its last order, ought to be enough, and possibly the present argument is superfluous; but it is preferable to err in the direction of doing too much rather than too little.

I.

**The question is clearly presented by the record.**

Counsel for appellees declare that it is not. What is the question? It is as to whether or not the exemption declared by the second section of the act of Congress of 1866, extends to anything beyond what is granted by that section, and exempts what may be acquired by the railroad company under the authority of the seventh section of the statute.

In their recent brief, counsel for appellees, at pages 3–4, give a quotation from appellant's petition which distinctly sets up the claim that the exemption extends only to the right of way through the public domain, and does not extend to that portion of the road which passes through land not included in such domain; and the assessments, one of which is copied at the same place in that brief, plainly distinguish between, and separate, the two, and were made just before this proceeding was begun, clearly for the purpose of emphatically and distinctly pointing out the difference. And yet it is gravely contended that the record fails to present the question of this difference. Comment is unnecessary.

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Appellees insist, however, that, because the collector did not assess the land itself where the road passed over what was not public domain, the assessments are utterly invalid, and that he must have proceeded on the theory that what he did assess was personal property; and it is further insisted that the entire case of appellant was predicated upon the idea of the superstructure of the railroad being personal property. It is also declared that "the sole claim made by the Territory, in the district court, in the supreme court of the Territory, and heretofore in this court," was that the

superstructure sought to be taxed was personal property. These mistakes of counsel for appellees are inexcusable. The assessments as made, are in language clearly intended to bring them under the first and second subdivisions of section 4019 of the compiled laws of 1897, which section has been heretofore quoted in appellant's original brief at page 10, and in appellee's brief of April 3, 1899, at page 17, and which distinctly declares such "improvements" to be real estate. Moreover, in appellant's original brief, at page 10, and in its reply brief, at page 3, it is carefully set out that it is not "claimed that the property in question can be taxed as personal property"; that "it must be classed as real estate under our statute"; and that "at no stage of these proceedings, from their initiation in the district court in New Mexico, to the present time, has the Territory claimed this property to be personal property." It has always been consistently asserted that it is real estate, and, under the statute, separable, for purposes of taxation, from the soil to which it is attached.

He would have been a singularly bold assessing officer in New Mexico who, in the face of the decision of this court in *East Alabama R. Co. v. Doe, 114 U. S., 350*, that a conveyance of land to a railroad company for the construction of a railroad "in fee simple," gave "merely an easement on the land," would have undertaken to assess land acquired in like manner in New Mexico, with the improvements thereon, as a whole, thus running the risk of being held to attempt to unite things corporeal with an incorporeal hereditament, when the statute clearly permitted the assessment of those things as real estate, regardless of the condition of the title to the land to which they might be affixed.

Appellees ought not now to be heard to complain that the assessment does not cover all that might have been taxed. The error, if any, was in their favor. If this court shall declare that, under the seventh

section of the act of Congress, the railroad company secures absolute title to the land acquired, it will then be proper to assess the property as fully as appellees desire, and not before. But the assessment, even then, under the New Mexican system, would properly be of the land as one item, and of the improvements thereon as another. Reference to the statute above referred to, and to the forms of assessment rolls in the record (page 38) made in pursuance of the statute quoted as section 2834, on page 46 of appellees' original brief, and as section 4044 at page 17 of their brief now under consideration, will show how this is done. These forms are, as a whole, substantially, and in this particular exactly, such as have always been used ever since the passage of the statute in 1880.

What is here said is to be considered as a reply also to what is urged under the "Third Point" of appellee's brief of April 3d.

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The confident assertion of counsel for appellees on page 8 of their brief, that, on the hearing of this case in the district court, "It was never suggested * * * in any manner, that there was the slightest difference * * * between the Valencia county case and the case already decided by the supreme court," is somewhat singular, in view of the fact that neither of the learned gentlemen whose names are signed to the brief, was present at that hearing and they certainly do not testify from personal knowledge; while the petition in this case, which was before the court at that time, clearly indicated the difference in the only way proper on the record. If I may be permitted also to testify, on the doubtful theory that an infraction of propriety on one side of a case justifies another on the opposite side—it may at least palliate the offense—I will say that my recollection is that I did mention to the district judge the difference be-

tween this case and the others, and that he thought, in view of the sweeping character of the opinion of the supreme court of New Mexico, that it was immaterial. In the supreme court of the Territory the brief filed for appellant was a hasty reprint of the earlier briefs, with some changes in arrangement, and was made only for the purpose of avoiding a possible chance of dismissal for failure to comply with a rule of the court. I cannot now, from memory, testify as to whether or not anything was said in that court about the difference between the cases; but it is significant that the curiously-worded motion of appellees was denied—not "sustained," as counsel for appellees state on page 10 of their brief of April 3d—by that court. (*Record, page 87.*)

The motion set up that the court had in the earlier case "decided every question involved in this case," and that therefore "this case is *stare decisis.*" The court was not willing to commit itself to this statement, and denied the motion, although willing to affirm the case on the authority of their previous decision; but it did not, as appellees assert, "determine that there was no difference between the two cases, either in fact or law." It appears, rather, to have refused so to determine.

II.

**There can be no doubt that this court has jurisdiction to consider this case.**

Counsel for appellees assert that because an assignment of errors was not annexed to and returned with the record of this case in accordance with section 997 of the Revised Statutes, this court has no jurisdiction. Such assertion argues either great desperation or great ignorance on the part of the asserter, and there can be no reason to believe that any of the learned gentlemen who appear for appellees are ignorant.

This court has uniformly refused to consider the provisions of section 997 as mandatory or jurisdictional, and has put its view of the law in a rule of practice, in which it has declared that, at its option, it "may notice a plain error not assigned or specified;" and has decided that errors specified according to the rule will be considered, even if the statute has been disregarded. In some cases it has examined errors relied on, although no assignments of errors had been made in accordance with either the statute or the rule.

*School District v. Hall, 106 U. S., 428.*
*Hecker v. Fowler, 1 Black, 95.*
*Farrar v. Churchill, 135 U. S., 613.*
*Gregory C. M. Co. v. Starr, 141 U. S., 223.*

Errors were specified in this case as required by the rule, and in accordance with the usual practice of the court, and are sufficiently set up to raise every point discoverable in the record.

III.

**This case should be reversed as a whole.**

Inasmuch as the first petition for a rehearing in all of the cases has not been passed upon, and a rehearing has been granted in this case without any limitation, it seems pertinent briefly to urge that any reversal of this judgment should go to the whole case and not be limited to the difference between this and the other cases.

Appellant respectfully calls attention to what is set out in its first petition for rehearing on the other points involved, and insists that the arguments and authorities cited show conclusively:

*First*, that the decision of the court as to the meaning of the phrase "right of way" in the act of Congress, is in utterly irreconcilable conflict with its own earlier decisions;

*Second*, that in determining the meaning of said phrase, the court is at variance with the weight of authority in the United States;

*Third*, that, in 1866, when Congress acted, no one had ever dreamed of such a meaning for right of way as is now given to it;

*Fourth*, that the application to this case, of the common law rule that what is affixed to the soil becomes a part thereof, is not in harmony with the rules of construction heretofore laid down by this court in cases of claimed exemptions from taxation, nor with the weight of authority in the United States, and, by a highly artificial implication, expands the meaning of the language of Congress far beyond its ordinary, obvious and necessary meaning.

The reasons and authorities which establish these positions, are set out at some length in the petition for rehearing, and will not be here repeated.

It is respectfully submitted that the case should be reversed and remanded with directions to enter a decree for all which the appellant has claimed.

F. W. CLANCY,
*Counsel for Appellant.*